Supreme Court, U.S.
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No. 99-___

In The

Supreme Court of the United States

ALI MOGHADAM,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can Congress by-pass the Copyright Clause and create copyright protections under the Commerce Clause that it could not create under the Copyright Clause?

PARTIES TO THE PROCEEDING

In addition to Petitioner Ali Moghadam, the only other party in the Eleventh Circuit Court of Appeals was Respondent, appellee below, United States of America.

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PETITION FOR WRIT OF CERTIORARI

Ali Moghadam, the petitioner in the above-captioned case, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Eleventh Circuit entered on May 19, 1999.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on May 19, 1999 and captioned as *United States v. Ali Moghadam* (11th Circuit number 97-2180). The opinion was published as *United States v. Ali Moghadam*, 175 F.3d 1269 (11th Cir. 1999). A copy of that opinion appears herein as Appendix "A." A timely petition for rehearing with suggestion for rehearing *en banc* was filed in the Eleventh Circuit on June 7, 1999. That petition was denied on August 27, 1999. A copy of the order denying the petition for rehearing with suggestion for rehearing *en banc* appears herein as Appendix B.

JURISDICTION

The federal district court had jurisdiction over Petitioner's case pursuant to 18 U.S.C. section 3231. The Eleventh Circuit Court of Appeals had jurisdiction over an appeal from a final judgment of a district court under 28 U.S.C. section 1291. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. Constitution, Article I, Section 8, clause 3, Commerce Clause: Congress shall have the power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

2. U.S. Constitution, Article I, Section 8, clause 8, Copyright Clause: Congress shall have the power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

3. 18 U.S.C. section 2319A:

Whoever, without the consent of the performer or performers involved, knowingly and for the purpose of commercial advantage or private financial gain –

> (1) fixes the sound or sounds or images of a live musical performance in a copy of phonocard, or reproduces copies of phonocards of such a performance from an unauthorized fixation;
>
> (2) transmits or otherwise communicates to the public the sounds or sounds and images of a live musical performance; or
>
> (3) distributes or offers to distribute, sells or offers to sell, rents or offers to rent, or traffics in any copy or phonocard fixed as described in paragraph (1), regardless of whether the fixations occurred in the United States;

shall be imprisoned for not more than 5 years. . . .

STATEMENT OF THE CASE AND FACTS

A. Procedural History

An indictment was returned in the Middle District of Florida on March 27, 1997, charging Petitioner Ali Moghadam, hereafter just Moghadam, and twelve others with various offenses connected to the sale of "bootleg" recordings. Moghadam was named only in Count Seven and he alone was charged with that Count. Count Seven of the indictment alleged that Moghadam violated 18 U.S.C. section 2319A by distributing and selling compact discs fixed with the sounds of live performances without the consent of the performers. On May 9, 1997, a superseding indictment was returned. The only change made in the superseding indictment was to alter the number of the count alleged against Moghadam from Count Seven to Count Four.

On May 30, 1997, Moghadam filed a motion to dismiss the indictment. Moghadam moved to dismiss the indictment on the basis that 18 U.S.C. section 2319A was unconstitutional. On June 12, 1997, the government filed written opposition to Moghadam's motion to dismiss. On July 9, 1997, the district court rubber stamped "denied" on Moghadam's motion to dismiss the indictment. The court did not otherwise issue an order or opinion concerning Moghadam's motion to dismiss the indictment.

On August 11, 1997, Moghadam plead guilty to Count Four. Moghadam expressly reserved the right to appeal the district court's denial of his motion to dismiss the indictment on the ground that 18 U.S.C. section 2319A was unconstitutional.

A sentencing hearing was held on November 19, 1997. The district court imposed a sentence of two years probation and an $8,000 fine. Moghadam's notice of appeal was also filed on November 19, 1997.

On May 19, 1999, the Eleventh Circuit issued its published opinion. In that opinion the Court of Appeals ruled that 18 U.S.C. section 2319A was not unconstitutional. Moghadam filed a timely petition for rehearing with suggestion for rehearing *en banc* in the Eleventh Circuit on June 7, 1999. That petition for rehearing with suggestion for rehearing *en banc* was denied on August 27, 1999.

B. Statement Of The Facts

Count Four of the superseding indictment alleged that Moghadam violated 18 U.S.C. section 2319A by knowingly distributing, selling, or trafficking in compact discs fixed with the sounds and images of live performances without the consent of the performers.[1] At the

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[1] The term "fixed" is defined in 17 U.S.C. section 101 as follows: "A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." A live performance, that is not yet

plea hearing, the government indicated that at a trial it would have produced recordings of telephone conversations between a Thomas Chang and Moghadam "in which they agreed to have Mr. Moghadam ship these digital audio tapes containing unauthorized fixations of the Beastie Boys and Tori Amos to Mr. Chang, for Mr. Chang to copy them in exact disk format, return them to Mr. Moghadam for his sale."

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case to determine the limits of Congressional power. Or, can Congress by-pass the Copyright Clause and use its authority under the Commerce Clause to create copyright protections which it cannot create pursuant to the Copyright Clause?

A. Introduction

The legal issue raised by Moghadam in this proceeding is whether 18 U.S.C. section 2319A is constitutional. To resolve that issue, however, the Court must address a fundamental constitutional question that has never been addressed or answered by this Court. All parties concede that section 2319A creates copyright protections and that those protections cannot pass constitutional muster under the Copyright Clause. The government and the Eleventh Circuit Court of Appeals have taken the position in this case that Congress can by-pass the Copyright Clause and

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taped or otherwise captured in a "tangible medium" is "unfixed."

create these copyright protections by way of its authority under the Commerce Clause. Moghadam has argued that Congress cannot by-pass the specifically enumerated grant of authority contained in Article I, Section 8, clause 8, the Copyright Clause, to create copyright protections under the Commerce Clause. The position of the Eleventh Circuit and the government, if allowed to stand, opens the door for Congress to legislate all copyright protections by way of the Commerce Clause and thus render the Copyright Clause, and potentially every other limited grant of authority contained in Article I, Section 8, superfluous. This Court must grant certiorari in this case and answer this question by setting precise limitations on Congressional authority. This Court should clearly indicate that Congress cannot by-pass express Constitutional limitations on its legislative authority set forth in the various clause of Article I, section 8, to create rights and obligations by way of its expansive power under the Commerce Clause.

B. The Genesis Of The Question

1. The Statute: 18 U.S.C. section 2319A

18 U.S.C. section 2319A states:

> Whoever, without the consent of the performer or performers involved, knowingly and for the purpose of commercial advantage or private financial gain –
>
> (1) fixes the sound or sounds or images of a live musical performance in a copy of phonocard, or reproduces copies of phonocards of

> such a performance from an unauthorized fixation;
>
> (2) transmits or otherwise communicates to the public the sounds or sounds and images of a live musical performance; or
>
> (3) distributes or offers to distribute, sells or offers to sell, rents or offers to rent, or traffics in any copy or phonocard fixed as described in paragraph (1), regardless of whether the fixations occurred in the United States;
>
> shall be imprisoned for not more than 5 years. . . .

There is virtually no Congressional history for this statute.[2] On December 8, 1994, Congress enacted the Uruguay Round Agreements Act (URRA). Pub. L. No. 103-465, 108 Stat. 4809, 4973 (1994). The URRA was rushed through a largely lame-duck Congress on "fast-track procedures" and signed by the President the same day. The URRA was derived from the Uruguay Round of the General Agreement on Tariffs and Trade (GATT). GATT is an international arrangement under which nearly eighty countries have negotiated common norms for international trade.

Contained in the URRA was the Agreement on Trade-Related Aspects of Intellectual Property Rights, or TRIPs. 18 U.S.C. section 2319A was part of the TRIPs. A companion civil section, almost identical to section 2319A, was

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[2] See e.g. Nimmer, *The End of Copyright*, 48 Vand. L. Rev. 1385, 1409 (1995): "One seeks in vain for evidence that anyone in Washington even considered the constitutional basis for these vitally important amendments to United States copyright law."

also added to U.S.C. Title 17, Copyrights, by TRIPs. These provisions together made up the "anti-bootlegging" sections of the URRA. Concerning these provisions, Representative Hughes of New Jersey stated generally: "There are a number of changes *in copyright* that will advance our interests in the area of bootlegging, which is going to basically protect our country." See 140 Cong. Rec. H1141, H11457 (Nov. 29, 1994) (emphasis added).

2. A Constitution Source For Section 2319A?

a. The Copyright Clause

Since *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819) it has been fundamental constitutional law that a Congressional enactment is constitutional only if derived from one of the enumerated grants of legislative authority set forth in the Constitution. The Copyright Clause of the Constitution, set forth in Article I, section 8, is such an enumerated grant of legislative authority to Congress. By that Clause, Congress is empowered "to promote the Progress of Science and the Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their Respective Writings And Discoveries." U.S. Const. art. I, section 8, cl. 8.

In the district court and in the Court of Appeals, Moghadam argued that section 2319A was unconstitutional. In particular, Moghadam argued that section 2319A could not be based upon Congress' grant of authority under the Copyright Clause. In the Court of Appeals, the government agreed that section 2319A could not be sustained pursuant to Congress' authority under the Copyright Clause. Similarly, the Eleventh Circuit

assumed *arguendo* that section 2319A could not be sustained under the Copyright Clause. The Court of Appeals noted, as both Moghadam and the government had pointed out, that section 2319A expressly applied to "unfixed" performances. The Copyright Clause can only create rights in "Writings and Discoveries." The opinions of this Court have uniformly held that the term "Writings," as used in the Copyright Clause, cannot apply to unfixed, live performances. See *Goldstein v. California*, 412 U.S. 546, 561 (1973): "Writing" must be a "physical rendering." See also *United States v. Moghadam, supra*, 175 F.3d at 1273-1274, quoting Nimmer, *The End of Copyright, supra*, 48 Vand. L. Rev. at 1409: "No respectable interpretation of the word 'writings' embraces an untaped performance of someone singing at Carnegie Hall." Thus, there is uniform agreement that section 2319A cannot be sustained by way of Congress' grant of authority under the Copyright Clause.

b. The Commerce Clause

In the Court of Appeals, while recognizing that Congress never cited the Commerce Clause as a source of authority, the government argued that section 2319A could be sustained under the Commerce Clause even if it could not be under the Commerce Clause. This Court has held that the Commerce Clause empowers Congress to legislate activities that substantially affect interstate commerce. A Congressional act will be upheld as constitutional if a rational basis exists for concluding that the activity which is the subject of the act sufficiently affected interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-559 (1995). For purposes of this proceeding,

Moghadam does not dispute, as the Eleventh Circuit found, that section 2319A "has sufficient connection to interstate and foreign commerce to meet the *Lopez* test." *United States v. Moghadam, supra,* 175 F.3d at 1277. Thus, the Eleventh Circuit found that section 2319A might be upheld as a proper use of Congress' legislative authority under the Commerce Clause pursuant to the standards set forth in *Lopez*. *United States v. Moghadam, supra,* 175 F.3d at 1277.

C. The Question: Can Congress Create Copyright Protections By Way Of The Commerce Clause That It Cannot Create By Way Of The Copyright Clause?

As the Eleventh Circuit noted, finding that section 2319A meets the *Lopez* standard does not resolve the crucial constitutional question. "The more difficult question in this case is whether Congress can use its Commerce Clause power to avoid the limitations that might prevent it from passing the same legislation under the Copyright Clause." *United States v. Moghadam, supra,* 175 F.3d at 1277. Or to put the question in more general terms, can Congress use the expansive powers of the Commerce Clause to circumvent the limited grants of authority set forth in the remaining clauses of Article I, section 8? And, if Congress can so circumvent those limited grants of power, have not the remaining clauses of Article I, section 8 been rendered superfluous? Justice Thomas has already anticipated this question and answered it with a resounding no, rejecting the position

taken by the Eleventh Circuit in this case. In his concurring opinion in *United States v. Lopez, supra,* 514 U.S. at 585, Justice Thomas stated:

> In an appropriate case, I believe that we must further reconsider our "substantial effects" test with an eye toward constructing a standard that reflects the text and history of the Commerce Clause without totally rejecting our more recent Commerce Clause jurisprudence . . . But on this Court's understanding of congressional power (under the Commerce Clause) many of Congress' other enumerated powers under Art. I, section 8, are wholly superfluous. After all if Congress may regulate all matters that substantially affect commerce, there is no need for the Constitution to specify that Congress may enact bankruptcy law, cl. 4, or coining money or fix the standard of weights or measures, cl. 5 . . . An interpretation of cl. 3 (the Commerce Clause) . . . that makes the rest of Section 8 superfluous simply cannot be correct.

Justice Thomas would have added, had he been reviewing this case, if Congress can create copyright protections under the Commerce Clause, there is no need for a Copyright Clause because *all* copyright law "substantially affects" interstate commerce. *Mazer v. Stein,* 347 U.S. 201, 219 (1953).

1. The Eleventh Circuit's Incorrect Answer To The Question

As noted above, Justice Thomas has already determined that Congress cannot use the Commerce Clause in

such a way as to render the remaining grants of legislative authority in Article I, Section 8 superfluous. However, that is exactly what the Eleventh Circuit did in this case.

The Eleventh Circuit addressed the constitutional question presented by first noting the apparent "tension" between two cases. *United States v. Moghadam, supra,* 175 F.3d at 1279.

One the one hand, the Court of Appeals found that *Heart of Atlanta Motel v. United States,* 379 U.S. 241 (1964) stood for the proposition that "as a general matter, the fact that legislation reaches beyond the limits of one grant of legislative power has no bearing on whether it can be sustained under another." *United States v. Moghadam, supra,* 175 F.3d at 1277. Thus, under this reasoning, whether section 2319A violated the Copyright Clause would be irrelevant if it passed muster under the Commerce Clause.[3]

On the other hand, the Court of Appeals recognized that *Railway Labor Executives' Ass'n v. Gibbons,* 455 U.S. 457 (1982) held that "some grants of legislative authority in Article I, section 8 contain significant limitations that

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[3] Moghadam contends that the Court of Appeal simply misunderstood *Heart of Atlanta Motel.* The question presented here is not whether the source of authority expressly cited by Congress is sufficient, the situation presented in *Heart of Atlanta Motel,* but whether, when the source of authority expressly cited by Congress is clearly not sufficient, may the statute nevertheless be found constitutional on a basis never considered by Congress. *Heart of Atlanta Motel* never remotely addressed this question.

can be said to represent the Framers' judgment that Congress should be affirmatively prohibited from passing certain types of legislation, no matter under which provision." *United States v. Moghadam, supra,* 175 F.3d at 1279. Under *Railway Labor Executives,* Congress would not be able to circumvent the limitations inherent in the term "Writings" in the Copyright Clause by passing a statute under the Commerce Clause which created copyright protection for works that are not "Writings."

The Eleventh Circuit resolved this "tension" by holding that:

> We hold that the Copyright Clause does not envision that Congress is positively forbidden from extending copyright-like protection under other constitutional clauses, such as the Commerce Clause, to works of authorship that may not meet the fixation requirement inherent in the term "Writings." The grant itself is stated in positive terms, and does not imply any negative pregnant that suggests that the term "Writings" operates as a ceiling on Congress' ability to legislate pursuant to other grants.

United States v. Moghadam, supra, 175 F.3d at 1280.

In other words, the Eleventh Circuit concluded, while some grants of legislative authority in Article I, section 8 contain significant limitations that can be said to represent the Framer's judgment that Congress should be affirmatively prohibited from passing certain types of legislation, no matter under which provision, *Railway Labor Executives' Ass'n v. Gibbons,* the Copyright Clause, and more particularly the fixation requirement inherent in "Writings," is not one of them. This is so, the Eleventh

Circuit reasoned, because the grant of power enumerated in the Copyright Clause is "positive" and does not imply any "negative" that operates as a "ceiling" on Congress.

2. Certiorari Should Be Granted So That This Court Can Properly Resolve The Constitutional Question Incorrectly Resolved By The Eleventh Circuit

The Eleventh Circuit cited no authority for its novel proposition that the Copyright Clause was solely a "positive" grant of power which contained no "ceiling" on Congress' ability to legislate "pursuant to other grants." More importantly, the Court of Appeals was wrong. Its opinion flies in the face of the conclusion reached by every commentator who has addressed the issue. The opinion of the Court of Appeals opens a constitutional door which no court has ever dared to open and through which Congress may simply disregard the limited grants of legislative power bestowed upon it by the Constitution.

3. The Copyright Clause Is A Limited Grant Of Authority That Congress Cannot Simply By-pass

It is beyond question that the "powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written." *City of Boerne v. P.F. Flores*, 521 U.S. 507, 516 (1997) quoting *Marbury v. Madison*, 1 Cranch 137, 176, 2 L.Ed. 60 (1803). Every commentator which has addressed the issue has found that the term "Writings" in the Copyright

Clause is a limitation that Congress cannot go beyond. See e.g. Heald, *The Vices of Originality,* 1991 Sup. Ct. Rev. 143, 169, 173 (1991): "This interpretation suggests that section 8 of Article I does more than grant Congress a laundry list of powers – it also places substantive limitations on Congress . . . The history of the Intellectual Property Clause sheds additional light on the propriety of the Court's insistence that it functions as not only a grant of power but a strong substantive limitation." See also Nimmer, *The End of Copyright, supra,* 48 Vander. L. Rev. at 1411-1412: "The affirmative grant of limited powers to Congress via the Copyright Clause is irrelevant" if Congress grants protections to creations that are not "writings" under the Commerce Clause; Cohen, *Copyright and The Jurisprudence of Self-Help,* 13 Berkeley Tech. L. J. 1089, 1132 (1998): "Thus, Congress may not invoke the commerce power to do what the Intellectual Property Clause bars it from doing; granting 'exclusive rights' in unpatentable or uncopyrightable subject matter;" Pollack, *Unconstitutional Incontestability; The Intersection of Intellectual Property and Commerce Clauses of the Constitution; Beyond a Critique of Shakespeare Co. v. Silstar Corp.,* 18 Seattle U. L. Rev. 259, 279 (1995): " . . . the Intellectual Property Clause (is) an especially clear instance of the Constitution's repeated enumeration of specific powers for the purpose of limiting those powers." One commentator, William Patry, directly addressed the precise question raised here. "When Congress is barred from legislating under the Copyright Clause . . . the question arises whether Congress may grant the same or similar protection through its Commerce Clause power." Patry, *The Enumerated Powers Doctrine and Intellectual Property:*

An Imminent Constitutional Collision, 67 Geo. Wash. L. Rev. 359, 367 (1999). Patry answered the question bluntly: "When a specific clause of the Constitution, such as Clause 8 of Article I, Section 8, has been construed as containing general limitations on Congress' power, Congress may not avoid those limitations by legislating under another clause." *Id.*, at 362.

These commentators, particularly Patry, find support for their view of a limited Copyright Clause which cannot be by-passed by Congress in two recent unanimous opinions of this Court, both written by Justice O'Connor. In *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989) and *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, 499 U.S. 340 (1991) this Court clearly demarcated the boundaries of Congress' power in two ways.

First, the Court held that the "primary objective of copyright is not to reward the labor of authors, but to promote the Progress of Science and the useful Arts." *Feist Publications, Inc. v. Rual Telephone Service Company, Inc., supra*, 499 U.S. at 349. The Eleventh Circuit adopted the contrary view. It held that Science and the Useful Arts were promoted by "securing some exclusive rights to the creative author." *United States v. Moghadam, supra*, 175 F.3d at 1280. In short, the Eleventh Circuit's opinion is based upon a view of the Copyright Clause which places emphasis on the rights of the author, which are essentially commercial rights, not on the non-commercial benefit to the public from the promotion of the Sciences. A review of the reasoning adopted by the Eleventh Circuit lead Nimmer to opine that permitting Congress to by-

pass the Copyright Clause when creating copyright protections would mean that "two centuries of rooting copyright enactments in the Copyright Clause now appears, from the present perspective, to have been simply a phase. It is difficult indeed to discern any limits here. If unfixed works (e.g. live musical performances which are not 'Writings') can be protected perpetually with something akin to copyright, then what conceivable implementation lies beyond Congress' powers. The affirmative grant of limited powers to Congress via the Copyright Clause is irrelevant because vastly greater affirmative powers have been arrogated under the commerce technique." Nimmer, *The End of Copyright, supra,* at 1411-1412. In short, by finding that the "essence" of the Copyright Clause is the benefit the public derives from works that promote Science, this Court established a limit on the scope of Congress' authority. Pursuant to the Copyright Clause, Congress can create copyright protections that promote Science. It cannot by-pass the Copyright Clause and create copyright protections whose essence is to "reward the labor of authors" and affect interstate commerce.

Secondly, also contrary to the opinion of the Eleventh Circuit, this Court has found a "negative pregnant" in the Copyright Clause. When the Court ruled in *Feist* that compilations of facts that do not feature an "original selection or arrangement" were not entitled to protection under the Copyright Clause, it recognized a negative right, the public's right to copy such unprotected material. *Feist Publications, Inc. v. Rural Telephone Service Company, Inc., supra,* 499 U.S. at 350-351; see also Patry, *The Enumerated Powers Doctrine And Intellectual Property: An*

Imminent Constitutional Collison, supra, 67 Geo. Wash. L. Rev. at 367-368: "Congress' inability to provide copyright-like protection for unoriginal material is not only the result of a specific limitation on its enumerated power when legislating under Article I, Section 8, Clause 8; it is also the result of a general constitutional right of the public to copy such material – a type of Tenth Amendment public domain for intellectual property." Thus, it follows from *Feist,* Congress cannot by-pass the limitations of the Copyright Clause to create copyright protections that nullify any such "negative rights" created by the limitations of the Copyright Clause itself.

Clearly a split of authority exists. On the one hand, the Eleventh Circuit held in this case that Congress may simply by-pass the Copyright Clause and used its more expansive powers under the Commerce Clause to create copyright protections which affect commerce and are thus essentially commercial rights. On the other hand, the commentators are uniform in their belief that the Copyright Clause is a limited grant of authority that cannot simply be by-passed by Congress to create new copyright protections that clearly are beyond the scope of the Copyright Clause. The commentators' view is supported by this Court's general holding in *Railway Labor Executives' Association v. Gibbons* and its recent holding in *Bonito Boats, Inc.* and *Feist.* Certiorari should be granted in this case so that the Court can resolve this issue: can Congress by-pass a specific enumerated grant of power, such as its authority under the Copyright Clause, to create rights and obligations under the Commerce Clause that cannot be created under the Copyright Clause?

D. The Question, If Unanswered

The Eleventh Circuit's opinion in this case has opened the door for Congress to greatly expand its power. Whenever it wishes to create a right or obligation that it cannot otherwise create pursuant to one of the enumerated grants of authority set forth in Article I, Section 8, it will turn to the expansive power of the Commerce Clause to create that right or obligation. All it need do to create that right or obligation under the Commerce Clause, according to the Eleventh Circuit, is find some connection to interstate commerce. Once that step is taken, as Justice Thomas pointed out in *Lopez*, the rest of the enumerated powers in Article I, Section 8 become superfluous. Or, as Nimmer pointed out, "copyright now serves as an adjunct of trade." Nimmer, *The End of Copyright, supra*, 48 Vand. L. Rev. at 1412.

Left unchecked, such an expansion of Congressional power will destroy the structural integrity of the Constitution. No longer will the power of Congress be "defined and limited." *City of Boerne v. P.F. Flores, supra*, 521 U.S. at 516. Instead, the power of Congress will be defined solely by its ability to find an effect on interstate commerce by its acts. Bodies of law, such as patents and intellectual property, will cease to exist. All bodies of law derived from the enumerated grants of authority set forth in Article I, Section 8 will be, as Nimmer pointed out, "an adjunct of trade." The Copyright Clause, as well as every other clause in Article I, Section 8 except the Commerce Clause, will be rendered superfluous.

Such a grant of authority to Congress cannot stand. This Court must grant certiorari in this case to reverse the

ruling of the Eleventh Circuit and check any expansion of Congressional power inherent in the structure of the Constitution. This Court must grant certiorari and rule that Congress cannot by-pass the Copyright Clause and use its authority under the Commerce Clause to create copyright protections that undisputedly cannot be created under the Copyright Clause.

In this case, since all parties agree section 2319A cannot be sustained under the Copyright Clause, and, as argued above, it should not be sustained under the Commerce Clause, this Court should find that section 2319A exceeded the scope of Congress' authority and is thus unconstitutional.

CONCLUSION

For the foregoing reasons, the instant Petition for a Writ of Certiorari should be granted and this Court should find that 18 U.S.C. section 2319A is unconstitutional.

Dated: November 22, 1999

Respectfully submitted,

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UNITED STATES of America, Plaintiff-Appellee,

v.

Ali MOGHADAM, Defendant-Appellant.

No. 98-2180.

United States Court of Appeals,
Eleventh Circuit.

May 19, 1999.

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Appeal from the United States District Court for the Middle District of Florida.

Before ANDERSON, Chief Judge, HULL, Circuit Judge, and HAND*, Senior Circuit Judge.

ANDERSON, Chief Judge:

In 1994, Congress passed a statute criminalizing the unauthorized recording, the transmission to the public, and the sale or distribution of or traffic in unauthorized recordings of live musical performances. *See* 18 U.S.C. § 2319A. Appellant Ali Moghadam was convicted of violating that law (herein sometimes referred to as the "anti-bootlegging statute") after he pleaded guilty to knowingly distributing, selling, and trafficking in bootleg

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*Honorable William B. Hand, Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

(unauthorized) compact discs featuring live musical performances by recording artists including Tori Amos and the Beastie Boys. The present appeal challenges the constitutional power of Congress to enact this legislation.[1] In the district court, Moghadam moved to dismiss the indictment, arguing that the statute was unconstitutional because it did not fall within any of the federal legislative powers enumerated in Article I, § 8 of the Constitution. The government responded that it was constitutional under either the Copyright Clause or the Commerce Clause. The district court denied the motion to dismiss. The constitutionality of the anti-bootlegging statute appears to be a question of first impression in the nation. For the reasons that follow, and in the limited circumstances of this case, we reject Moghadam's constitutional challenge, and therefore affirm Moghadam's conviction.

I. BACKGROUND ON THE ANTI-BOOTLEGGING STATUTE

A brief overview of the history of statutory protection for music and musical performances is in order. Musicians or performers may enjoy copyright or copyright-like protection in three things, which are important to keep distinct. First, a musical composition itself has been protected by statute under copyright law since 1831. *See* 17 U.S.C. § 102(a)(2) (providing that "musical works, including any accompanying words" are protectable subject matter); Todd D. Patterson, Comment, The Uruguay

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[1] In pleading guilty, Moghadam duly preserved his right to appeal.

Round's Anti-Bootlegging Provision: A Victory for Musical Artists and Recording Companies, 15 Wis. Int'l L.J. 371, 380-83 (1997). However, for most of the nation's history, sound recordings were not protected. *See Patterson, supra,* at 380 ("The important distinction between the first copyright statutes of 1831 and what would ultimately become the Sound Recording Act of 1971 is that these early statutes protected the reproduction of musical notation rather than the reproduction of actual sound."). In 1971, Congress extended copyright protection to sound recordings. Sound Recording Act of 1971, Pub.L. No. 92-140, 85 Stat. 391;[2] *see* also 17 U.S.C. § 102(a)(7) (including "sound recordings" in the list of copyrightable "works of authorship"). This meant that persons who made unauthorized reproductions of records or tapes, which is known as "piracy,"[3] could be prosecuted or face civil liability for copyright infringement. *See* 17 U.S.C. § 114 (defining the scope of exclusive rights of the holder of a copyright in sound recordings). The copyright law, especially as amended by further statutes,[4] went far toward

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[2] The entire copyright code was subsequently overhauled by the Copyright Act of 1976, Pub.L. No. 94-553, 90 Stat. 2541, but the new statute carried forward the substance of the Sound Recording Act of 1971.

[3] "Piracy," which refers to an unauthorized duplication of a performance already reduced to a sound recording and commercially released, is conceptually distinct from "bootlegging," which has been defined as the making of "an unauthorized copy of a commercially unreleased performance." *Dowling v. United States,* 473 U.S. 207, 209 n. 2, 105 S.Ct. 3127, 87 L.Ed.2d 152 (1985).

[4] *See Piracy and Counterfeiting Amendments Act of 1982,* Pub.L. No. 97-180, 96 Stat. 91 (codified at 18 U.S.C. §§ 2318-2319)

securing the rights of musicians and recording artists to receive fair benefit from their creative efforts.

However, following passage of the Sound Recording Act of 1971, a void still remained. No protection at the federal level extended directly to unrecorded live musical performances.[5] Therefore, a bootlegger could surreptitiously record a live musical performance and engage in unauthorized distribution of the recording or copies thereof, without having violated copyright law. This gap in copyright protection, exacerbated by the growing market for such bootleg copies, motivated Congress to enact the anti-bootlegging provision at issue in the instant case.

The anti-bootlegging statute grew out of the Agreement on Trade Related Aspects of Intellectual Property ("TRIPs"), which has been described as "the highest expression to date of binding intellectual property law in the international arena." David Nimmer, The End of

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(imposing criminal liability for trafficking in counterfeit labels attached to phonorecords); Record Rental Amendment of 1984, Pub.L. No. 98-450, 98 Stat. 1727 (codified at 17 U.S.C. §§ 109(b), 115(c)) (prohibiting rental of phonorecords to the public for commercial advantage); Audio Home Recording Act of 1992, Pub.L. No. 102-563, 106 Stat. 4237 (codified at 17 U.S.C. §§ 1001-1010) (implementing a royalty payment system and a serial copyright management system for digital audio recording); Digital Performance Rights in Sound Recordings Act of 1995, Pub.L. No. 104-39, 109 Stat. 336 (codified at scattered sections of 17 U.S.C.) (granting public performance rights for digital transmission of sound recordings).

[5] There were and still are, however, numerous examples of statutory protection for live musical performances at the state level. *See*, e.g., Fla. Stat. § 540.11(2)(a)(3).

Copyright, 48 Vand. L.Rev. 1385, 1391-92 (1995) [hereinafter Nimmer, The End of Copyright]. TRIPs became law by operation of the Uruguay Round Agreements Act ("URAA"), Pub.L. No. 103-465, 108 Stat. 4809 (1994), a comprehensive act dealing with matters of international trade. 18 U.S.C. § 2319A (which corresponds to § 513 of the URAA, 108 Stat. at 4975), provides, in pertinent part:

> (a) Whoever, without the consent of the performer or performers involved, knowingly and for purposes of commercial advantage or private financial gain –
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> (1) fixes the sound or sounds and images of a live musical performance in a copy or phonorecord, or reproduces copies or phonorecords of such a performance from an unauthorized fixation;
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> (2) transmits or otherwise communicates to the public the sounds or sounds and images of a live musical performance; or
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> (3) distributes or offers to distribute, sells or offers to sell, rents or offers to rent, or traffics in any copy or phonorecord fixed as described in paragraph (1), regardless of whether the fixations occurred in the United States;
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> shall be imprisoned . . . or fined . . . or both. . . .

The URAA also enacted a similar provision establishing civil liability for the same conduct (but omitting the commercial advantage or private financial gain requirement). *See* 17 U.S.C. § 1101 (corresponding to § 512 of the URAA, 108 Stat. at 4974). There is little legislative history dealing with either provision because the URAA was

rushed through Congress on fast-track procedures. However, what little legislative history exists tends to suggest that Congress viewed the anti-bootlegging provisions as enacted pursuant to its Copyright Clause authority. *See* 140 Cong. Rec. H11441, H11457 (daily ed. Nov. 29, 1994) (statement of Rep. Hughes) ("There are a number of changes in copyright that will advance our interests in the area of bootlegging, which is going to basically protect our country.").

The rights created by the anti-bootlegging provisions in URAA are actually hybrid rights that in some ways resemble the protections of copyright law but in other ways are distinct from them. *See* 3 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 8E.03[B][1], at 8E-16 [hereinafter Nimmer on Copyright] ("The unfixed musical performances protected under [URAA] are accorded something approximating, but not equaling, copyright protection."). For example, although the civil provision is incorporated into Title 17 of the United States Code and borrows the remedies that apply to copyright infringement, neither the civil nor the criminal provision meshes with the overall structure of the copyright code. *See Patterson, supra,* at 410-12. Congress could have amended 17 U.S.C. § 102 to include live musical performances in the list of protectable subject matter, but it did not do so. Likewise, it is unclear whether longstanding concepts generally applicable to copyright law such as fair use, *see* 17 U.S.C. § 107, the work-for-hire doctrine, limited duration, *see* 17 U.S.C. § 302, and the statute of limitations, 17 U.S.C. § 507(b), carry over to the anti-bootlegging provisions. *See* 3 Nimmer on Copyright, *supra,* § 8E.03[B][2][b], at 8E-13 to 23; *see* also Susan M.

Deas, Jazzing up the Copyright Act? Resolving the Uncertainties of the United States Anti-Bootlegging Law, 20 Hastings Comm. & Ent. L.J. 567, 599-623 (1998) (providing detailed treatment of the host of interpretive problems associated with the anti-bootlegging statute); Nimmer, The End of Copyright, *supra,* at 1399 ("The provision of the law is so simple . . . and the language that Congress legislated so sparse, that most questions one could ask are simply not addressed in its implementation."). Finally, in contrast to the six exclusive rights of a copyright owner spelled out in 17 U.S.C. § 106, it appears that the only exclusive right created by the anti-bootlegging statute is to record and/or re-communicate one's performance.[6] For all of these reasons, the protections that the anti-bootlegging statutes confer on musicians are best described as "quasi-copyright" or sui generis protections.

II. WHETHER THE ANTI-BOOTLEGGING STATUTE CAN BE SUSTAINED UNDER THE COPYRIGHT CLAUSE OF THE CONSTITUTION

Our analysis of the constitutionality of § 2319A begins with the Copyright Clause of the United States Constitution. By that Clause, Congress is empowered "[t]o promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors

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[6] We raise these complexities only to differentiate between this statute and pure copyright provisions. Because none of them is implicated by the instant case and Moghadam's conduct falls squarely within the anti-bootlegging statute, we need not speculate as to the appropriate resolution of these questions.

the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8, cl. 8.[7] This positive grant of legislative authority includes several limitations. *See, e.g., Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991) (holding that the word "Writings" in the Copyright Clause allows Congress to extend protection only to works of authorship that are original). Of these limitations, Moghadam has relied in the instant case only on the concept of "fixation" which is said to be embedded in the term "Writings."

The concept of fixation suggests that works are not copyrightable unless reduced to some tangible form. "If the word 'writings' is to be given any meaning whatsoever, it must, at the very least, denote some material form, capable of identification and having a more or less permanent endurance." 1 Nimmer on Copyright, *supra*, § 1.08[C][2], at 1-66.30 (internal quotation marks omitted); *see also Goldstein v. California*, 412 U.S. 546, 561, 93 S.Ct. 2303, 37 L.Ed.2d 163 (1973) ("[W]ritings . . . may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor."). Of course, the term "Writings" has been interpreted so broadly as to include much more than writings in the literal sense, or the lay definition of the word.[8] *See* 17 U.S.C. § 102(a)(4)

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[7] The word "Discoveries" is thought to refer to the counterpart area of patent law. *See* 1 Nimmer on Copyright, *supra*, § 1.08, at 1-66.25 n. 1.

[8] Rejecting the notion that the Constitution "embalms inflexibly the habits of 1789," Judge Learned Hand wrote that the Copyright Clause's "grants of power to Congress comprise not only what was then known, but what the ingenuity of men

(pantomimes and choreographic works); *Id.* § 102(a)(6) (motion pictures and other audiovisual works); *Id.* § 102(a)(7) (sound recordings); 1 Nimmer on Copyright, *supra*, § 1.08[B], at 1-66.25-26. In fact, since a sound recording qualifies as a "Writing" in the constitutional sense, *Shaab v. Kleindienst*, 345 F.Supp. 589, 590 (D.D.C.1972) (per curiam), "it is now clear that a writing may be perceptible either visually or aurally," 1 Nimmer on Copyright, *supra*, § 1.08[B], at 1-66.27. But the fixation requirement seems to have persisted through this expansion. Thus, although in the modern era the term "Writings" allows Congress to extend copyright protection to a great many things, those things have always involved some fixed, tangible and durable form. *See Goldstein*, 412 U.S. at 561, 93 S.Ct. 2303 ("[W]ritings . . . may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor."); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58, 4 S.Ct. 279, 28 L.Ed. 349 (1884) (defining "Writings" as "all forms of writing, printing, engraving, etching, etc., by which the ideas of the mind of the author are given visible expression").

Moghadam argues that a live performance, by definition, has not been reduced to a tangible form or fixed as of the time of the performance. *See* Nimmer, The End of

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should devise thereafter. Of course, the new subject matter must have some relation to the grant, but we interpret by the general practice of civilized people in similar fields, for it is not a straitjacket but a charter for a living people." *Reiss v. National Quotation Bureau*, 276 F. 717, 719 (S.D.N.Y.1921).

Copyright, *supra*, at 1409 ("[N]o respectable interpretation of the word 'writings' embraces an untaped performance of someone singing at Carnegie Hall."); Susan M. Deas, Jazzing up the Copyright Act? Resolving the Uncertainties of the United States Anti-Bootlegging Law, 20 Hastings Comm. & Ent. L.J. 567, 570 (1998) ("The most obvious constitutional departure found in the [anti-bootlegging law] is how [it] extends protection to unfixed material under the authority of a congressional enactment."). Moghadam argues that, but for the bootlegger's decision to record, a live performance is fleeting and evanescent.

Because we affirm the conviction in the intstant case on the basis of analternatiev source of Congressional power, we decline to decide in this case whether the fixation concept of Copyright Clause can be expeanded so as to encompass live performances that are merely capable of being reduced to tangible form, but have not been.[9] For purposes of this case, we assume arguendo, without deciding, that the above described problems with the fixation requirement would preclude the use of the Copyright Clause as a source of Congressional power for the anti-bootlegging statute.

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[9] We note that the anti-bootlegging statute may be faced with another constitutional problem under the Copyright Clause. The Clause allows Congress to extend protection to authors only for "Limited Times." The protection afforded to live performances by § 2319A, however, contains no express time limitation and would arguably persist indefinitely. However, Moghadam has not preserved this argument, *see* infra, and we decline to address the argument in light of our disposition of this case.

III. WHETHER THE ANTI-BOOTLEGGING STATUTE CAN BE SUSTAINED UNDER THE COMMERCE CLAUSE OF THE CONSTITUTION

The government contends, however, that the anti-bootlegging statute is permissible legislation under Congress's Commerce Clause power.[10] Congress has the legislative authority "[t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. The Commerce Clause empowers Congress to legislate regarding three things: (i) the use of channels of interstate commerce; (ii) instrumentalities and persons or things in interstate commerce; and (iii) intrastate activities that substantially affect interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59, 115 S.Ct. 1624, 1629-30, 131 L.Ed.2d 626 (1995). Our analysis here focuses on the third category of appropriate legislation. The applicable test is "whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce." *Id.* at 557, 115 S.Ct. at 1629. To survive Commerce Clause scrutiny, § 2319A " 'must bear more than a generic relationship several steps removed from interstate commerce, and it must be a relationship

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[10] Congress's failure to cite the Commerce Clause as grounds for § 2319A does not eliminate the possibility that the Commerce Clause can sustain this legislation. "[T]he constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise," *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144, 68 S.Ct. 421, 92 L.Ed. 596 (1948), and "[i]n exercising the power of judicial review," we look only at "the actual powers of the national government," *Timmer v. Michigan Dept. of Commerce*, 104 F.3d 833, 839 (6th Cir. 1997) (emphasis added).

that is apparent, not creatively inferred.' " *United States v. Wright*, 117 F.3d 1265, 1270 (11th Cir.1997) (quoting *United States v. Kenney*, 91 F.3d 884, 888 (7th Cir.1996)), vacated in part on other grounds, 133 F.3d 1412 (11th Cir.), cert. denied, ___ U.S. ___, 119 S.Ct. 217, 142 L.Ed.2d 178 (1998).

Because Congress thought it was acting under the Copyright Clause, predictably there are no legislative findings in the record regarding the effect of bootlegging of live musical performances on interstate or foreign commerce. Such findings are normally helpful to a court in finding an interstate commerce nexus. *See Cheffer v. Reno*, 55 F.3d 1517, 1520 (11th Cir. 1995) (upholding statute regarding freedom of access to abortion clinics under the Commerce Clause and relying on a plethora of specific legislative findings in the record regarding the effect of violence and physical obstruction on commerce in reproductive health services); see also *United States v. Viscome*, 144 F.3d 1365, 1371 (11th Cir.) (holding that "explicit findings that the proscribed activity in issue substantially affected interstate commerce" are accorded "substantial deference"), cert. denied, ___ U.S. ___, 119 S.Ct. 362, 142 L.Ed.2d 299 (1998). However, the lack of such findings does not rule out the Commerce Clause as a possible source of legislative authority applicable to the statute under challenge. *Wright*, 117 F.3d at 1269. In *Lopez*, the Court said that although "congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye," *Lopez*, 514 U.S. at 563, 115 S.Ct. at 1632, "Congress normally is not required to make [such] formal findings," *Id.* at 562, 115 S.Ct. at 1631.

Section 2319A also contains no jurisdictional element as is commonly found in criminal statutes passed under authority of the Commerce Clause. That is, there is no requirement that, for example, the bootleg copies or phonorecords have traveled in interstate or foreign commerce. Just as legislative findings can help fortify a statute against Commerce Clause scrutiny, a jurisdictional element is helpful because it ensures that each individual case will necessarily satisfy the required interstate commerce nexus. *Lopez*, 514 U.S. at 562, 115 S.Ct. at 1631 (noting that express jurisdictional elements "limit [a statute's] reach to a discrete set of [offenses] that additionally have an explicit connection with or effect on interstate commerce"). However, the absence of such a jurisdictional element connecting the offense to interstate or foreign commerce does not necessarily mean the Commerce Clause cannot serve as authority. *Wright*, 117 F.3d at 1269; *see also Viscome*, 144 F.3d at 1371 & n. 12 (noting that even though Congress had recently amended statute criminalizing possession of machineguns to include jurisdictional element, that did not necessarily mean previous version of statute without jurisdictional element exceeded Commerce Clause authority); *United States v. Olin Corp.*, 107 F.3d 1506, 1510 (11th Cir.1997) ("[A]lthough Congress did not include in CERCLA either legislative findings or a jurisdictional element, the statute remains valid as applied in this case because it regulates a class of activities that substantially affects interstate commerce."). The absence of such a jurisdictional element simply means that "courts must determine independently whether the statute regulates 'activities that arise out of or are connected with a commercial transaction, which

viewed in the aggregate, substantially affect[ ] interstate commerce.' " *Olin Corp.*, 107 F.3d at 1509 (quoting *Lopez*, 514 U.S. at 561, 115 S.Ct. at 1631).

Section 2319A clearly prohibits conduct that has a substantial effect on both commerce between the several states and commerce with foreign nations. The link between bootleg compact discs and interstate commerce and commerce with foreign nations is self-evident. For example, one of the elements of the offense is that the activity must have been done "for purposes of commercial advantage or private financial gain." 18 U.S.C. § 2319A(a). If bootlegging is done for financial gain, it necessarily is intertwined with commerce. Bootleggers depress the legitimate markets because demand is satisfied through unauthorized channels. *Cf. Wickard v. Filburn*, 317 U.S. 111, 127-28, 63 S.Ct. 82, 87 L.Ed. 122 (1942) (finding an interstate commerce nexus sufficient to support federally mandated wheat growing limits in the fact that farmers who grew wheat for home consumption would not buy wheat in the normal market, thereby depressing commerce). Generally speaking, performing artists who attract bootleggers are those who are sufficiently popular that their appeal crosses state or national lines. The very reason Congress prohibited this conduct is because of the deleterious economic effect on the recording industry.[11] The specific context in which § 2319A was

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[11] The government's brief in the instant case traced the impact that bootlegging of live performances has on commerce:

> The trafficking in bootleg sound recordings results in unjust enrichment of persons who unfairly appropriate the intellectual property and potential

enacted involved a treaty with foreign nations, called for by the World Trade Organization, whose purpose was to ensure uniform recognition and treatment of intellectual property in international commerce. The context reveals that the focus of Congress was on interstate and international commerce.

Moreover, the type of conduct that Congress intended to regulate by passing the anti-bootlegging statute is by its very nature economic activity, which distinguishes the statute from the Gun-Free School Zones Act struck down in *Lopez*, which in criminalizing the possession of handguns within 1000 feet of a school, "ha[d] nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 514 U.S. at 561, 115 S.Ct. at 1630-31. *See also* Nimmer, The End of Copyright, *supra*, at 1410 n. 155 ("Although [*Lopez*] demonstrates that Congress's power under the Commerce Clause is not infinite, it does not remotely threaten the viability of this trade law, given how close to the core of economic activity the Uruguay

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> profits of sound recording companies and artists. The regulated activity thus substantially affects the profitability and viability of the aggregate sound recording industry. In other words, trafficking in bootleg sound recordings substantially affects and threatens the continuous interstate commercial activity generated by the artists and sound recording companies, which incur significant risks in the nationwide marketing of the fixed sounds of live musical performances.

Government's Initial Brief at 15.

Round Agreements lie."). We hold that the anti-bootlegging statute has a sufficient connection to interstate and foreign commerce to meet the *Lopez* test.

The more difficult question in this case is whether Congress can use its Commerce Clause power to avoid the limitations that might prevent it from passing the same legislation under the Copyright Clause. As noted above, we assume arguendo that the Copyright Clause could not sustain this legislation because live performances, being unfixed, are not encompassed by the term "Writings" which includes a fixation requirement. The government argues that the anti-bootlegging conviction in this case can be sustained under the Commerce Clause. We turn now to this issue.

In general, the various grants of legislative authority contained in the Constitution stand alone and must be independently analyzed. In other words, each of the powers of Congress is alternative to all of the other powers, and what cannot be done under one of them may very well be doable under another. Perhaps the most prominent example of this principle is *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964). There, the Supreme Court considered the constitutionality of the public accommodation provisions of the Civil Rights Act of 1964. The earlier *Civil Rights Cases*, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883), had declared unconstitutional similar provisions of the Civil Rights Act of 1875 because they regulated private conduct beyond the scope of the legislative authority granted by § 5 of the Fourteenth Amendment. Yet, the *Heart of Atlanta Motel* Court held, the Civil Rights Act of 1964 was

1964 was predicated on the Commerce Clause and possessed sufficient connection to interstate commerce. *See Heart of Atlanta Motel*, 379 U.S. at 250, 85 S.Ct. 348. The Court's reasoning illustrates that, as a general matter, the fact that legislation reaches beyond the limits of one grant of legislative power has no bearing on whether it can be sustained under another. *Id.* (concluding that Congress possessed ample power pursuant to the Commerce Clause, and "we have therefore not considered the other grounds relied upon. This is not to say that the remaining authority upon which it acted was not adequate, a question upon which we do not pass, but merely that since the commerce power is sufficient for our decision here we have considered it alone"); *see also South Dakota v. Dole*, 483 U.S. 203, 207, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987) (holding that pursuant to the Spending Clause, U.S. Const. art. I, § 8, cl. 1, Congress may condition its appropriation of money to the states on their agreement to impose restrictions that would be beyond Congress's constitutional legislative authority to enact directly).

This general approach has been applied in a context involving the Copyright Clause and the Commerce Clause as alternative sources of Congressional power. The Trade-Mark Cases, 100 U.S. (Otto) 82, 25 L.Ed. 550 (1879), involved an 1876 Congressional enactment of a primitive sort of trademark protection ("1876A Act"), long before the modern-day Lanham Act. Act of Aug. 14, 1876, 19 Stat. 141. This statute conferred protection on, and prohibited the counterfeiting of, various types of trademarks. The defendants were criminally prosecuted

under the 1876 Act for trying to pass off imitation beverage products as brand-name by imitating famous trademarks of well-known beverage makers. The defendants challenged the constitutionality of the 1876 Act, arguing that Congress did not have legislative authority to enact it. As in the instant case, the government responded by proffering the Copyright Clause and Commerce Clause as alternative possible bases of legislative authority.

Apparently, just as was the case with the anti-bootlegging statute, Congress labored under the impression that it was acting pursuant to its Copyright Clause power. The Trade-Mark Cases, 100 U.S. (10 Otto) at 93 ("[U]ntil a critical examination of the subject in the courts became necessary, it was mainly if not wholly to [the Copyright C]lause that the advocates of the law looked for its support."). Nevertheless, the Supreme Court held that the Copyright Clause could not sustain the 1876 Act because "[t]he ordinary trade-mark has no necessary relation to invention or discovery," which were the hallmarks of protectable subject matter under the Copyright Clause. The Trade-Mark Cases, 100 U.S. (10 Otto) at 94. Trademarks are inherently commercial; the concept behind the 1876 Act (and modern trademark law) was not to encourage intellectual and artistic development, but rather to protect businesses from predatory behavior in the marketplace. *See id.* ("[A trademark] requires no fancy or imagination, no genius, no laborious thought. It is simply founded on priority of appropriation."). These characteristics made trademarks substantively different from the material the Congress was constitutionally able to protect pursuant to the Copyright Clause. A trademark could be registered under the 1876 Act even without any

showing of originality. "While such legislation may be judicious aid . . . and may be within the competency of legislatures whose general powers embrace that class of subjects," the Court held, "we are unable to see any such power in the constitutional provision concerning authors and inventors, and their writings and discoveries." *Id.*

The Court next considered whether Congress could enact the 1876 Act under the Commerce Clause. The Court summarized the government's argument at the outset as that "the trade-mark is . . . a useful and valuable aid or instrument of commerce, and its regulation by virtue of the [Commerce C]lause belongs to Congress." *Id.* 100 U.S. (10 Otto) at 95. The Court appeared receptive to this argument. However, it must be remembered that the Trade-Mark Cases predated the New Deal-era expansion of the Commerce Clause. In the nineteenth century, "there still remain[ed] a very large amount of commerce, perhaps the largest, which, being trade or traffic between citizens of the same State, [was] beyond the control of Congress." *Id.* 100 U.S. (10 Otto) at 96. Unfortunately (but understandably, since Congress had labored under the impression that it was authorized to enact the 1876 Act under its Copyright Clause power), there was no jurisdictional-type element in the 1876 Act to ensure that trademark protection would extend only insofar as related to interstate commerce. *See id.* 100 U.S. (10 Otto) at 97 ("Here is no requirement that [a person receiving trademark protection] shall be engaged in the kind of commerce which Congress is authorized to regulate."). Consequently, the Court ultimately struck down the 1876 Act as not sustainable under either the Copyright Clause or the Commerce Clause.

Although the 1876 Act did not survive due to the restrictive view of the Commerce Clause prevailing at that time, the Supreme Court's analysis in the Trade-Mark Cases stands for the proposition that legislation which would not be permitted under the Copyright Clause could nonetheless be permitted under the Commerce Clause, provided that the independent requirements of the latter are met. Of course, we have already held that the anti-bootlegging statute satisfies the "substantial effects" test of post-*Lopez* Commerce Clause jurisprudence. The analysis in the Trade-Mark Cases tends to refute the argument that Congress is automatically forbidden from extending protection under some other grant of legislative authority to works that may not be constitutionally protectable under the Copyright Clause. Indeed, modern trademark law is built entirely on the Commerce Clause, *see, e.g., Jellibeans, Inc. v. Skating Clubs of Ga., Inc.*, 716 F.2d 833, 838 (11th Cir.1983), and we have found no case which suggests that trademark law's conferral of protection on unoriginal works somehow runs afoul of the Copyright Clause. See Michael B. Gerdes, Comment, Getting Beyond Constitutionally Mandated Originality as a Prerequisite for Federal Copyright Protection, 24 Ariz. St. L.J. 1461, 1471 (1992) ("The constitutionality of current federal trademark legislation . . . supports the conclusion that the Copyright Clause does not limit Congress's Commerce Clause power to grant copyright-like protection.").

A similar analysis was adopted by the Second Circuit in *Authors League of America, Inc. v. Oman*, 790 F.2d 220 (2d Cir.1986). There, the issue was the constitutionality of 17 U.S.C. § 601, a now-expired provision designed to protect

the domestic book publishing and printing industries by restricting the importation of copyrighted, nondramatic literary works which were published abroad. The plaintiffs argued, inter alia, that this statute went beyond Congress's legislative power under the Copyright Clause because of the introductory language in the Clause which restricts such legislation to that which helps to "promote the Progress of . . . useful Arts." Section 601, the plaintiffs argued, was essentially protectionist economic legislation that did not serve that purpose. The Second Circuit responded to this argument as follows:

> What plaintiffs' argument fails to acknowledge, however, is that the copyright clause is not the only constitutional source of congressional power that could justify [§ 601]. In our view, denial of copyright protection to certain foreign-manufactured works is clearly justified as an exercise of the legislature's power to regulate commerce with foreign nations.

790 F.2d at 224. The *Authors League* analysis suggests that the Commerce Clause may be used to accomplish that which the Copyright Clause may not allow.

On the other hand, it might be argued that some of the grants of legislative authority in Article I, § 8 contain significant limitations that can be said to represent the Framers' judgment that Congress should be affirmatively prohibited from passing certain types of legislation, no matter under which provision. The Supreme Court touched on such a situation in *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 102 S.Ct. 1169, 71 L.Ed.2d 335 (1982). Congress had enacted a statute that purported to alter a pending bankruptcy case by requiring the

debtor railroad company's bankruptcy estate to pay $75 million to the company's former employees. This statute directly clashed with the Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4, which provides that Congress is empowered to pass "uniform" bankruptcy laws, because the law targeted a particular situation and was anything but uniform. The Court quickly brushed off the possibility that the legislation could nevertheless be sustained under the Commerce Clause (which contains no uniformity requirement), stating that "if we were to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause, we would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws." *Id.* at 468-69, 102 S.Ct. 1169. In *Railway Labor Executives*, the statute that Congress passed directly conflicted with the uniformity requirement of the Bankruptcy Clause. Cf. Paul J. Heald, The Vices of Originality, 1991 Sup.Ct. Rev. 143, 168-75 (arguing that Congress would not be able to circumvent the originality requirement inherent in the term "Writings" in the Copyright Clause by passing a statute under the Commerce Clause which extended copyright-like protection to unoriginal works).

We note that there is some tension between the former line of cases (*Heart of Atlanta*, the *Trade-Mark Cases* and *Authors League*) and the *Railway Labor Executives* case. The former cases suggest that in some circumstances the Commerce Clause can be used by Congress to accomplish something that the Copyright Clause might not allow. But the *Railway Labor Executives* case suggests that in some circumstances the Commerce Clause cannot be used to eradicate a limitation placed upon Congressional power

in another grant of power. For purposes of the instant case, we resolve this tension in the following manner. In resolving this tension and in reaching our conclusion in this case, we undertake a circumscribed analysis, deciding only what is necessary to decide this case, and we reach a narrow conclusion. First, as described above, we hold the anti-bootlegging statute satisfies the "substantial effects" test of the post-*Lopez* Commerce Clause jurisprudence. Second, following the former line of cases (*Heart of Atlanta*, the *Trade-Mark Cases* and *Authors League*), we hold that in some circumstances the Commerce Clause indeed may be used to accomplish that which may not have been permissible under the Copyright Clause. We hold that the instant case is one such circumstance in which the Commerce Clause may be thus used. It is at this point that we must resolve the tension with *Railway Labor Executives*.

Resolving this tension, we take as a given that there are some circumstances, as illustrated by *Railway Labor Executives*, in which the Commerce Clause cannot be used by Congress to eradicate a limitation placed upon Congress in another grant of power.[12] For the reasons that follow, we hold that the instant case is not one such circumstance. We hold that the Copyright Clause does not envision that Congress is positively forbidden from

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[12] We assume arguendo, without deciding, that the Commerce Clause could not be used to avoid a limitation in the Copyright Clause if the particular use of the Commerce Clause (e.g., the anti-bootlegging statute) were fundamentally inconsistent with the particular limitation in the Copyright Clause (e.g., the fixation requirement).

extending copyright-like protection under other constitutional clauses, such as the Commerce Clause, to works of authorship that may not meet the fixation requirement inherent in the term "Writings." The grant itself is stated in positive terms, and does not imply any negative pregnant that suggests that the term "Writings" operates as a ceiling on Congress' ability to legislate pursuant to other grants. Extending quasi-copyright protection to unfixed live musical performances is in no way inconsistent with the Copyright Clause, even if that Clause itself does not directly authorize such protection. Quite the contrary, extending such protection actually complements and is in harmony with the existing scheme that Congress has set up under the Copyright Clause.[13] A live musical performance clearly satisfies the originality requirement. Extending quasi-copyright protection also furthers the purpose of the Copyright Clause to promote the progress of the useful arts by securing some exclusive rights to the creative author. Finally, with respect to the fixation requirement, upon which this opinion focuses, although a live musical performance may not have been fixed, or reduced to tangible form, as of the time the bootleg copy was made, it certainly was subject to having been thus fixed. Our conclusion that extending copyright-like protection in the instant case is not fundamentally inconsistent with the fixation requirement of the Copyright Clause is bolstered by an example from the prior copyright law. If a live performance is broadcast, e.g., by radio

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[13] In light of our disposition of this case, we need not address the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18, as a possible source of Congressional power.

or television, and simultaneously recorded by the performer, any unauthorized recording by a person receiving the broadcast constitutes copyright infringement of the sound recording or motion picture, notwithstanding that the infringer actually copied the live performance directly, and not the fixation thereof. This result is based upon the last sentence of the definition of "fixed" in 17 U.S.C. § 101. That last sentence provides: "A work consisting of sounds, images, or both, that are being transmitted, is 'fixed' for purposes of this title if a fixation of the work is being made simultaneously with its transmission." This definition creates a legal fiction that the simultaneous fixation occurs before the transmission and the unauthorized recording. *See* H.R. Rep. 94-1476 at 52-53, reprinted in 1976 U.S.C.C.A.N. 5659, 5665-66; 1 Nimmer on Copyright, *supra*, § 1.08[C][2], at 1-66.32 ("It is as if one who was dictating live into a tape recorder were overheard and copied at the moment of dictation. At that moment, the material has become a 'writing,' even if copied simultaneously, rather than a moment later."). While we are aware that the constitutionality of this aspect of the statute has never been tested, the ease with which it has been incorporated into the prior copyright law suggests that fixation, as a constitutional concept, is something less than a rigid, inflexible barrier to Congressional power. Indeed, if a performer under the prior law could effectively protect a live musical performance, circumventing the fixation requirement, simply by the device of simultaneous recordation, the anti-bootlegging law seems to us like more of an incremental change than a constitutional breakthrough. Common sense does not indicate that extending copyright-like protection to a live

performance is fundamentally inconsistent with the Copyright Clause.

For the foregoing reasons, we conclude that extending copyright-like protection in the instant case is not fundamentally inconsistent with the fixation requirement of the Copyright Clause. By contrast, the nonuniform bankruptcy statute at issue in *Railway Labor Executives* was irreconcilably inconsistent with the uniformity requirement of the Bankruptcy Clause of the Constitution.[14]

We note that there is another limitation in the Copyright Clause that may be implicated by the anti-bootlegging statute: the "Limited Times" requirement that forbids Congress from conferring intellectual property rights of perpetual duration. *See Pennock v. Dialogue*, 27 U.S. (2 Pet.) 1, 16-17, 7 L.Ed. 327, 333 (1829). On its face, the protection created by the anti-bootlegging statute is apparently perpetual and contains no express time limit; therefore phonorecords of live musical performances would presumably never fall into the public domain. *See* Nimmer, The End of Copyright, *supra*, at 1411 ("[T]he Caruso example of protecting a work from a century ago

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[14] Our holding is limited to the fixation requirement, and should not be taken as authority that the other various limitations in the Copyright Clause can be avoided by reference to the Commerce Clause. Compare Nimmer, The End of Copyright, *supra*, at 1413 (decrying that Congress may "jettison Feist" by analogy to the URAA because "[w]hy is a telephone book any further afield than a performance at Carnegie Hall?"), with *Gerdes*, *supra*, at 1461 (proposing that Congress legislatively overrule *Feist* and extend copyright protection to unoriginal works by relying on the Commerce Clause).

and for centuries into the future . . . is the antithesis of 'limited times.' "); *see also Goldstein v. California*, 412 U.S. 546, 560-61, 93 S.Ct. 2303, 37 L.Ed.2d 163 (1973) (suggesting that a copyright of unlimited duration would have a tendency to inhibit the progress of the arts). However, because Moghadam has not challenged the constitutionality of § 2319A on this basis,[15] we decline to raise the issue sua sponte. Thus, we do not decide in this case whether extending copyright-like protection under the anti-bootlegging statute might be fundamentally inconsistent with the "Limited Times" requirement of the Copyright Clause, and we do not decide in this case whether the Commerce Clause can provide the source of Congressional power to sustain the application of the anti-bootlegging statute in some other case in which such an argument is preserved. We reserve those issues for another day.

Summarizing our narrow holding in this case, we assume arguendo, without deciding, that the anti-bootlegging statute cannot satisfy the fixation requirement of the Copyright Clause; we hold that the statute satisfies the "substantial effects" test of the post-*Lopez* Commerce

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[15] Moghadam did not make this argument in the district court or in his brief on appeal. He fleetingly mentions the "Limited Times" requirement for the first time in his reply brief on appeal, and even then does not argue that extending copyright-like protection in this case pursuant to the Commerce Clause would be prohibited by an inconsistency with the "Limited Times" requirement of the Copyright Clause. The government has not had any opportunity to present a defense to such an argument, and it would be unfair to entertain the argument at this late date.

Clause jurisprudence; we hold that the Commerce Clause can provide the source of Congressional power in this case because the extension of copyright-like protection here is not fundamentally inconsistent with the fixation requirement of the Copyright Clause;[16] and thus under the circumstances of this case,[17] we reject Moghadam's constitutional challenge to his conviction.

IV. CONCLUSION

For the foregoing resons,[18] the judgment of the district court is AFFIRMED.

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[16] Because we find no such inconsistency, we need not decide the consequences if there were inconsistency. *See* note 12, *supra*.

[17] As noted above, Moghadam has waived any constitutional challenge based on the "Limited Times" requirement of the Copyright Clause, and thus our holding in this case is further narrowed by the fact that we do not address potential arguments based on the "Limited Times" requirement.

[18] We reject Moghadam's other arguments on appeal without need for discussion.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-2180

(Filed Aug 27, 1999)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALI MOGHADAM,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19___, ___ F.2d ___).

Before: ANDERSON, Chief Judge, HULL, Circuit Judge, and HAND* Senior District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled

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*Honorable William B. Hand, Senior U.S. District Judge for the Southern District of Alabama, sitting by designation.

on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ CHIEF JUDGE

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(2)

No. 99-879

Supreme Court, U.S.
FILED
JAN 25 2000
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In The
Supreme Court of the United States

ALI MOGHADAM,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AMICUS CURIAE COALITION FOR THE PRESERVATION OF PERFORMED MUSIC IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE IN THIS CASE

Amicus curiae, the Coalition for the Preservation of Performed Music, is a coalition of individuals and organizations interested in preserving and promoting public access to copyrightable intellectual property, such as the live musical performances at issue in this case, for the purposes of scholarship and personal edification.[1] *Amicus curiae* include attorneys, law professors, musicians, music scholars, university librarians, and others who are rare musical performance enthusiasts. *Amicus curiae* is sensitive to this Court's concerns, articulated in Supreme Court Rule 37.1, regarding the burden of redundant briefing.[2] Our brief highlights significant relevant legal argument which has not been effectively articulated in these proceedings yet should be of assistance to the Court.

This *amicus* brief sets forth our considered views regarding the public interest which prompted the drafting of the Copyright Clause and continues to be served by copyright jurisprudence developed pursuant to that Clause. We are concerned that the briefing throughout this litigation, including Petitioner's Petition for Writ of Certiorari, has not meaningfully articulated this public interest, how the Copyright Clause was created to protect this interest, or the specific subject matter to which this

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[1] Rule 37.6 Disclosure: Counsel for Amicus authored this brief in its entirety and submitted this brief without any assistance, participation, or monetary contribution from any party in this case.

[2] Rule 37.2(a) Disclosure: Written consent to file this brief has been received from both parties in this case and copies are attached.

interest pertains. It is our view that only by considering the unique and specific subject matter contemplated by the Copyright Clause can the exclusive nature of the authority conferred by the Clause be recognized. We believe the Eleventh Circuit decision misconstrues these fundamental principles of copyright jurisprudence, and, as a consequence, inadvertently yet dramatically undermines the public interest served thereby. We are determined to forestall any further erosion of this interest by vigorously arguing its merits while there is still an opportunity to do so.

The Eleventh Circuit decision presents a novel and important question of federal law which requires the attention of this Court. The decision marks a significant and, we believe, erroneous departure from long-standing copyright jurisprudence, in conflict with decisions by this Court and the federal statutory copyright scheme. In addition, the decision dramatically expands the scope of Congress' Commerce Clause authority at the expense of the Copyright Clause and the important public interests that clause was intended to protect. At issue here is nothing less than the future course of American copyright law. This case will either trigger the eclipse of copyright before an expanding Commerce Clause or it will reaffirm the unique legal structure created under copyright to protect the public interest served by limiting exclusive rights in original works of authorship. The pending Petition for Writ of Certiorari should be granted, the Eleventh Circuit decision reversed, and 18 U.S.C. § 2319A found unconstitutional.

SUMMARY OF ARGUMENT

The Copyright Clause establishes a careful balance between conflicting public and private interests in a specific type of intellectual property, namely, original works of authorship. In light of the complex balance of interests created under the Copyright Clause, it is a mistake to view the Clause simply as a source of congressional authority to protect individual rights in original works. However, both Petitioner and the Eleventh Circuit obscure the crucial constitutional distinction at the heart of this case, considering the types of statutory protections afforded under the Copyright and Commerce Clauses, rather than focusing upon the nature of the intellectual property the statutes seek to protect. The crucial constitutional issue underlying this case is whether Congress' authority *to create rights in copyrightable original works* is limited to that granted under the Copyright Clause. The significance of the ruling below is that, for the first time, a court has found that copyrightable intellectual property, in this instance live musical performances, is not exclusively a matter of copyright authority.

We believe the court's ruling is in error in four different respects. First, the context and unique structure of the Copyright Clause strongly suggest the Framers intended to single out original works of authorship for special treatment under the law distinct from Congress' broader authority under the Commerce Clause. Second, the court misconstrues the significance of the fixation requirement and the important public purpose it serves. The court's evisceration of the fixation requirement is an unnecessary

and ill-considered departure from two centuries of copyright jurisprudence. Third, the court appears to completely misunderstand the concept of "simultaneous fixation," and, as a consequence, misapplies it's own constitutional test, concluding that 18 U.S.C. § 2319A is not "fundamentally inconsistent" with the fixation requirement. Finally, ironically, simultaneous fixation itself shows that Congress' authority under the Copyright Clause is wholly adequate to combat the type of conduct prohibited by 18 U.S.C. § 2319A, without undermining the important public purpose served by the Clause or fundamentally altering the constitutional structure among and between Congress' enumerated powers.

The issue before this Court is not whether, as the Eleventh Circuit stated, the Commerce Clause "may be used to accomplish that which may not have been permissible under the Copyright Clause." The issue here is whether Congress has the authority to legislate concerning rights in original works of authorship under any other source of authority except the Copyright Clause. It is our view that the Framers' intended, and more than two centuries of copyright law have understood, that Congress had no authority to create more expansive rights in original works than those authorized and clearly demarcated by the Copyright Clause. 18 U.S.C. § 2319A, creating exclusive rights in original works of authorship, plainly exceeds the scope of Congress' authority under the Copyright Clause and must, therefore, give way. We urge the Court to grant review in this case and reestablish the careful demarcation of authority created under the Copyright Clause by declaring this statute unconstitutional.

ARGUMENT

1. The Copyright Clause Establishes A Balance Of Interests Concerning A Specific Subject Matter (Original Works of Authorship) Designed, Foremost, To Benefit The Public

The Copyright Clause in Art. I, Sec. 8, Cl. 8 of the Constitution establishes a careful balance between conflicting public and private interests in a specific type of intellectual property. The Clause authorizes Congress to legislate "[t]o promote the Progress of Science and useful Arts," by creating a limited exclusive right to "Writings and Discoveries." As pertains to copyright, the term "Writings" has been interpreted to specify only original works of authorship as being within the scope of the Clause. Indeed, originality has been characterized as the "*sine qua non* of copyright." *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, 499 U.S. 340, 348 (1990).

The Copyright Clause authorizes Congress to offer an author or inventor the exclusive right to reproduce and distribute their original works for a limited period, recognizing that the potential monetary reward derived from that right would encourage further innovation and scholarship in "Science and the useful Arts." It is generally understood that the Framers felt such a time-limited monopoly was a necessary evil to secure the broader public benefits of increased scientific and artistic innovation. "The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation

must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *see, generally*, Adam Smith, *The Wealth of Nations*, Book V, Ch. 1, Pt. III, Art. I., *text following heading titled*, "The grant of a temporary monopoly . . . may sometimes be reasonable, but a perpetual monopoly creates an absurd tax.".

In light of the complex balance of interests created under the Copyright Clause, it is a mistake to view the Clause simply as a source of congressional authority to protect individual rights in original works. As the Court stated in *Twentieth Century Music*, "[t]he immediate effect of our copyright law is to secure a fair return for an author's creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the public good." *Twentieth Century Music*, 422 U.S. at 156. *See, also, United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) ("The sole interest of the United States and the primary motivation for conferring the monopoly lie in the general benefits derived by the public from the labors of authors.") As such, the Copyright Clause does not create any moral or property right in an original work independent of the wider public purpose it serves. *See, generally*, Nimmer on Copyright, § 8D.01 (1999).

2. The Proceedings Below Erred In Separating The Protections Authorized Under Copyright Clause From The Limited Scope And Public Purpose Of That Clause

The proceedings below disembodied the rights and protections authorized by the Copyright Clause from the

subject matter it concerns. After the Government conceded that 18 U.S.C. § 2319A exceeded Congress' authority under the Copyright Clause, it asked the Eleventh Circuit panel to find that the statute was authorized under the Commerce Clause. The court, reviewing *Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457 (1982), considered whether the Copyright Clause constituted an exclusive or, rather, an alternative source of authority to create "copyright-like protection." *United States v. Moghadam*, 175 F.3d 1269, 1280 (11th Cir. 1999) (henceforward, App. 24). The court first examined the *Trademark Cases*, 100 U.S. 82 (1879), in which this Court considered a challenge to an 1876 statute creating copyright-like protections for trademarks. The Court first asked whether the subject matter of the statute, trademarks, was copyrightable. *Id.* 100 U.S. at 93-94. Once the Court concluded that trademarks were not original works subject to copyright, it then considered whether the Commerce Clause might serve as an alternative source of authority to enact the statute. *Id.* 100 U.S. at 95. Although the Court struck down the statute in that case, it concluded that the Commerce Clause might authorize legislation creating rights in uncopyrightable intellectual property. *Id.* 100 U.S. at 96-97.

The Eleventh Circuit's opinion below actually inverts the *Trademark Cases* holding, citing it for the more general proposition that "Congress is [not] automatically forbidden from extending protection under some other grant of legislative authority to works that may not be constitutionally protectable under the Copyright Clause." (App. 20.) The accuracy of this gloss depends upon the definition of the terms "not . . . constitutionally protectable under the Copyright Clause." The 1876 statute before the

Trademark Cases Court concerned trademarks – unoriginal works – which are not "constitutionally protectable under the Copyright Clause" because they exceed the specific subject matter of the Clause, namely, original works of authorship. On the other hand, 18 U.S.C. § 2319A concerns "live musical performances," original works which are, without question, subject matter within the purview of the Copyright Clause. 17 U.S.C. § 102(a)(2) (identifying "musical works, including any accompanying words" as "original works of authorship"). Thus, live musical performances are clearly "constitutionally protectable under the Copyright Clause," although, unless they are fixed, they are not, in fact, copyrighted. 17 U.S.C. § 102(a) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression. . . . "). A more accurate characterization of the holding in the *Trademark Cases* would be, "Congress is [not] automatically forbidden from extending protection under some other grant of legislative authority to works *beyond the subject matter of* the Copyright Clause." The *Trademark Cases* says no more than this and, for this reason, the court's reference to the *Trademark Cases* is inapposite to the issue before this Court.

Turning to the issue before this Court, Petitioner's Question Presented For Review is, unfortunately, equally imprecise. "Can Congress create copyright protections by way of the Commerce Clause that it cannot create by way of the Copyright Clause?" (Petitioner's Br. 10.) Again, the proper response depends upon the definition of an imprecise term, in this case, "copyright protections." As the court below noted, the Lanham Act affords a trademark holder exclusive rights and remedies for infringement quite similar to those afforded a copyright holder

and does so wholly under Congress' Commerce Clause authority, as required by the holding in the *Trademark Cases*. (App. 20, 23); *see also*, 15 U.S.C. §§ 1052, 1116-1120 (providing remedies for infringement of an exclusive right in a trademark). Indeed, insofar as the Lanham Act permits infringement claims, the protections afforded under the Act are more akin to "copyright protections" than the preemptive criminal prohibitions found in 18 U.S.C. § 2319A, which plainly exceed the scope of the Copyright Clause.

Both Petitioner and the Eleventh Circuit inadvertently obscure the crucial constitutional distinction at the heart of this case, considering the types of statutory protections afforded under the Copyright and Commerce Clauses, rather than focusing upon the nature of the intellectual property the statutes seek to protect. The Lanham Act concerns unoriginal works, trademarks, and thus Congress has no authority to create rights in that property under the Copyright Clause. The *Trademark Cases* determined that Congress has authority to do so under its Commerce Clause authority. In contrast, 18 U.S.C. § 2319A concerns live musical performances which constitute original works of authorship. Congress has the authority to create rights in these works under the Copyright Clause. Nevertheless, 18 U.S.C. § 2319A clearly exceeds the scope of authority granted under the Copyright Clause. Therefore, the crucial constitutional issue underlying this case is whether Congress' authority to create rights in copyrightable original works is limited to that granted under the Copyright Clause. The significance of the ruling below is that, for the first time, a court has found that copyrightable intellectual property, in this instance live musical performances, is not exclusively a

matter of copyright authority, but rather may be regulated under the Commerce Clause where the Copyright Clause proves too limited.

3. The Real Question Before This Court: Is The Copyright Clause The Sole Source Of Congressional Authority To Create Exclusive Rights In Copyrightable Intellectual Property?

In the ruling below, the Eleventh Circuit concluded that the Copyright Clause is not Congress' exclusive source of authority to legislate concerning copyrightable original works. We believe the court's ruling is in error in four different respects. First, the context and unique structure of the Copyright Clause strongly suggest the Framers intended to single out original works of authorship for special treatment under the law distinct from Congress' broader authority under the Commerce Clause. Second, the court misconstrues the significance of the fixation requirement, effectively abandoning it, an unnecessary and ill-considered departure from two centuries of copyright jurisprudence. Third, the court appears to completely misunderstand the concept of "simultaneous fixation," and, as a consequence, misapplies it's own constitutional test, concluding that 18 U.S.C. § 2319A is not "fundamentally inconsistent" with the fixation requirement. Finally, ironically, simultaneous fixation itself shows that Congress' authority under the Copyright Clause is wholly adequate to combat the type of conduct prohibited by 18 U.S.C. § 2319A, without undermining the important public purpose served by the Clause or fundamentally altering the constitutional structure among and between Congress' enumerated powers. For these reasons, we urge the court to grant certiorari in this

case, reverse the Eleventh Circuit decision, and find 18 U.S.C. § 2319A unconstitutional.

A. The Copyright Clause Evinces The Framers' Intention To Confer A Special Legal Status Upon Original Works Of Authorship And Set Them Apart From Congress' Broader Authority To Regulate Commerce

As outlined above, the Copyright Clause fashions a balance of interests which simultaneously creates a proprietary right in original works and limits the duration of that right, all for the expressed purpose of furthering the public interest in having broad access to these works. The Clause sets out explicit limits regarding the duration and subject matter of copyright protection, evidence that the Framers made a deliberate decision to delimit the scope of rights inhering in original works of authorship to those articulated in the Copyright Clause itself. The fact these limited rights exist to maintain a balance between public and private interests strongly suggests that more extensive exclusive rights created under the Commerce Clause are inimical to the Framers' purpose in fashioning the balance in the first place.

Furthermore, the Copyright Clause is unique among the Enumerated Powers in that it contains an explicit statement of purpose justifying and limiting the exercise of legislative authority thereunder. The fact that these qualifications are enshrined as part of our fundamental law suggests that the Framers made a deliberate decision to prevent Congress from enacting broader rights concerning original works under its more general legislative powers. After all, the Framers could have given broader

scope to Congress' legislative authority regarding original works of authorship. The fact that they did not, but rather fashioned a balance of interests under the Copyright Clause, strongly suggests that the Framers intended to create a special legal status for original works of authorship which would serve to insulate those works from Congress' broader authority under the Commerce Clause.

In contrast, the Commerce Clause is an open-ended grant of authority lacking the specificity of scope, purpose, and duration which the Copyright Clause contains. It seems inconceivable that the Framers would have troubled with carefully limiting the scope of rights created in original works under the Copyright Clause had they intended that Congress could create more extensive rights in original works pursuant to its authority under the Commerce Clause. *See, generally,* Tribe, American Constitutional Law, 2d Ed., Chap. 5, § 5-7, fn. 2 (1988) (suggesting congressional abuse of commerce power may best be determined by identifying core values protected by other constitutional provisions and "fencing Congress out" from exercising its commerce power where it would undermine these values).

B. Contrary To The Holding Below, The Fixation Requirement Is A "Fundamental Criteria" Of Copyright Law And Of Central Importance To Furthering The Public Interest Served By Copyright

The 1976 Copyright Act identifies "originality and fixation" as the two "fundamental criteria of copyright protection" accorded pursuant to the Copyright Clause.

17 U.S.C. § 102(a) and Notes of Comm. on the Judiciary, H. R. Rep. No. 1476, 94th Cong. (1976) ("The two fundamental criteria of copyright protection – originality and fixation in tangible form – are restated in the first sentence of this cornerstone provision."); Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§ 101-1101 (1994)). The fixation requirement is understood to be implicit within the use of the term "Writings" in the Copyright Clause. *Goldstein v. California*, 412 U.S. 546, 561 (1973) ("[W]ritings . . . may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor."). Just as the "originality" requirement is the threshold inquiry to determine whether a type of intellectual property is *copyrightable*, the "fixation" requirement determines whether copyrightable intellectual property has, in fact, been *copyrighted*. 17 U.S.C. § 102(a) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression. . . . "). Therefore, contrary to the Eleventh Circuit's contention that "fixation, as a constitutional concept, is something less than a rigid, inflexible barrier to Congressional power," there is simply no copyright protection without fixation. 17 U.S.C. §§ 101-102, Notes of Comm. on the Judiciary, *supra*, "Fixation in a Tangible Form." ("The two essential elements – original work and tangible object – must merge through fixation in order to produce subject matter copyrightable under the statute.")[3]

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[3] Under the 1976 Copyright Act, "subject matter copyrightable under the statute" is a subset of that which is copyrightable under the Copyright Clause, as may be seen in the sentence preceding: "It is possible to have an "original work of authorship" without having a "copy" or "phonorecord"

The Eleventh Circuit opinion does not recognize any substantive content within the fixation requirement. Nonetheless, fixation furthers copyright's broader public purpose in two important respects. First, fixation restricts copyright protection to the tangible expression of original works rather than to the ideas underlying those works. 17 U.S.C. § 102(b) (codifying "idea/expression dichotomy" from common law). In this manner, fixation safeguards the public interest in maintaining a free and public market of ideas. *See, generally,* Patry, *The Enumerated Powers Doctrine and Intellectual Property: An Imminent Constitutional Collision,* 67 Geo. Wash. L. Rev. 359, 362-365 (1999) (outlining jurisprudence recognizing "idea/expression dichotomy" and public right to free access to ideas). The codification of the "fair use doctrine" within copyright law underscores the importance of this free and public market of ideas to the overall copyright scheme. 17 U.S.C. § 107. Together, the idea/expression dichotomy and the fair use doctrine further counterbalance an individual's exclusive right to her original works, in favor of public access. Sobel, *Bootleggers Beware: Copyright Law Now Protects Live Musical Performances, But New Law Leaves Many Questions Unanswered,* 17 Ent. L. Rep. 1, 9, fn. 45 (July 1995).

Bereft of any fixation requirement, the idea/expression distinction will likely blur beyond recognition and the awkward structure of rights and duties created under copyright will lose much of its coherence. As the opinion

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embodying it . . . " This brief consistently identifies fixed original works (the Act's "subject matter copyrightable under the statute") as "copyrighted" works and unfixed original works as "copyrightable" works.

below blithely states, "[e]xtending quasi-copyright protection also furthers the purpose of the Copyright Clause to promote the progress of the useful arts by securing some exclusive rights to the creative author." (App. 24.) Would this expansive reading of the Copyright Clause not also permit extending quasi-copyright protection to the ideas expressed in these unfixed performances? The court offers no self-regulating principles which might constrain quasi-copyright protection from any sphere currently under copyright.[4] *See, generally,* Nimmer, *The End of Copyright,* 48 Vand. L. Rev. 1385-1387, 1399-1401, 1411-1416 (1995).

In addition to maintaining the more esoteric idea/expression dichotomy, fixation promotes the concrete and public purpose of preserving original works. Fixation is the affirmative act required of an author or creator in exchange for the benefits of an exclusive right to that work. The creator of the work must also preserve the fixed copy – indeed, register a copy with the Copyright Office – if she is to maintain an enforceable exclusive right in the work. 17 U.S.C. § 411(a) (mandating registration as a jurisdictional requirement to bring an infringement action). Thus, importantly, though perhaps incidentally, the fixation and preservation of an original work increases the likelihood that the work will eventually become accessible to the public. This is of particular

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[4] The court posits a kind of quasi-fixation requirement to justify extending "quasi-copyright protections," reasoning, " . . . although a live musical performance may not have been fixed, or reduced to tangible form, as of the time the bootleg copy was made, it certainly was subject to having been thus fixed." (App. 24.) *Amicus,* however, can ascertain no clear meaning from this assertion.

importance when considering live musical performances. Unlike most types of original works, live musical performances are ephemeral works which, unless fixed at the time of performance, are lost to all but the immediate audience at the moment each note fades. Public access, both scholarly and recreational, is only possible if these performances are fixed. By prohibiting the unauthorized fixation of any live musical performance, 18 U.S.C. § 2319A grants performers an exclusive right to control access to a performance without requiring any affirmative act by the performer to fix and preserve the performance herself. Nimmer, *The End of Copyright*, *supra*, at 1409. Moreover, this right is both perpetual and retroactive. Nimmer on Copyright, *supra*, § 8E.03(c)(2). The practical effect of the statute is that live musical performances will not be fixed at all and so the performances often will be lost to the public forever. There are numerous examples of both authorized and unauthorized fixations later becoming available to the public which, under the broad preemptive right created by this statute, would most likely have never been fixed, or later discarded.[5]

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[5] There are a number of celebrated examples of unauthorized copies, bootlegs, which have gained unquestioned cultural significance over time. For instance, unauthorized recordings made of various arias from the 1901-1903 seasons at the New York Metropolitan Opera remain the only extant recordings of several of the prominent performers of the day. Many of William Shakespeare's own plays appear to have been originally compiled and preserved surreptitiously by audience members and actors. Clinton Heylin, *Bootleg: The Secret History of the Other Recording Industry*, 17-19 (1994).

Finally, fixation may be understood to support a general public right to have access to uncopyrighted original works. The Copyright Clause affords performers an exclusive right to their original fixed works only as a means to encourage further creativity and public access to the fruits of this labor. This limited, qualified, right constitutes a carefully defined exception to the general rule that both ideas and expression, once made public, fall within the public domain. "The general rule of law is, that the noblest of human productions – knowledge, truths ascertained, conceptions, and ideas – become after voluntary communication to others, free as the air to common use." *International News Service v. Associated Press*, 248 U.S. 215, 250 (1918) (Justice Brandeis, *dissenting*).

C. The Eleventh Circuit Decision Further Misconstrues The Significance Of Simultaneous Fixation, Minimizing The Importance Of Fixation Overall, And, Consequently, Misapplies It's Own "Fundamentally Inconsistent" Test

Simultaneous fixation requires a would-be copyright holder to fix any broadcast or transmission of a live performance simultaneous with its transmission. 17 U.S.C. § 101. The authorized fixation confers copyright protection to the work and will be deemed to have preceded any unauthorized fixation made of either the performance or its transmission. As such, simultaneous fixation is simply the logical application of the fixation requirement to live broadcasts.

The Eleventh Circuit decision misinterprets the purpose and significance of fixation as a whole and

simultaneous fixation in particular. "Extending quasi-copyright protection to unfixed live musical performances is in no way inconsistent with the Copyright Clause . . . [q]uite to the contrary, [it] actually complements and is in harmony with the existing scheme that Congress has set up under the Copyright Clause." (App. 24.) The court considers this conclusion "bolstered" by the example of simultaneous fixation.

> While we are aware that the constitutionality of [simultaneous fixation] has never been tested, the ease with which it has been incorporated into the prior copyright law suggests that fixation, as a constitutional concept, is something less than a rigid, inflexible barrier to Congressional power. Indeed, if a performer under the prior law could effectively protect a live musical performance, *circumventing the fixation requirement, simply by the device of simultaneous recordation,* the anti-bootlegging law seems to us like more of an incremental change than a constitutional breakthrough.

(App. 25) (emphasis added).

Of course, simultaneous recordation *is* fixation and thus does not "circumvent" the fixation requirement, but rather fulfills it. Nor should it seem remarkable that simultaneous fixation "has been incorporated into prior copyright law" since it is simply the application of the fixation requirement to live broadcasts. Operating under a basic misapprehension of copyright law, the court mistook a constitutional breakthrough for an "incremental change," and, unable to ascertain any purpose to the fixation requirement, felt free to discard it as meaningless.

It is a constitutional breakthrough nonetheless. As outlined above, fixation encourages the preservation and distribution of works which might otherwise be lost to the public forever. Indeed, this is the absurd result achieved by 18 U.S.C. § 2319A. Under the statute a performer has no affirmative duty to fix and preserve the performance, but receives a perpetual, retroactive, exclusive right to any sound recording or transmission of the performance. The statute undermines copyright's primary purpose, granting broader exclusive rights in original works than permitted under the Copyright Clause, without furthering the public interest those rights were designed to serve. By upholding the statute, the Eleventh Circuit has permitted the Commerce Clause to intrude upon the subject matter of the Copyright Clause, to exceed the scope of rights permitted under the Copyright Clause, and to undermine the public purpose served by the Copyright Clause. It is difficult to imagine a statute more fundamentally inconsistent with existing copyright law.

D. Simultaneous Fixation Shows Congress' Authority Under The Copyright Clause Is Wholly Adequate To Combat The Conduct Prohibited By 18 U.S.C. § 2319A Without Extending Commerce Clause Authority to Copyrightable Intellectual Property

Ironically, Congress might easily have achieved the purpose of 18 U.S.C. § 2319A simply by amending existing copyright law to expand the definition of fixation to include simultaneous fixation of live musical performances. The scope of the right granted thereunder would

be of limited duration, but it would avoid the wholesale assault on the Copyright Clause currently advocated by the Government. More importantly, consistent with the purpose espoused within the Copyright Clause, such an amendment would increase the likelihood that performances would be fixed and preserved, creating greater opportunity for future distribution of these original works for public study and enjoyment. With an adequate remedy so near at hand within existing copyright law, it seems especially ludicrous to seek to discard the fixation requirement, upending more than two centuries of copyright in the process.

CONCLUSION

For the foregoing reasons, the pending Petition for Writ of Certiorari should be granted, the Eleventh Circuit decision reversed, and 18 U.S.C. § 2319A found unconstitutional.

Respectfully submitted,

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No. 99-879

In the Supreme Court of the United States

ALI MOGHADAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner's conviction under 18 U.S.C. 2319A, for knowingly distributing, selling, and trafficking in unauthorized recordings of live musical performances, could be sustained pursuant to the Commerce Clause.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-28) is reported at 175 F.3d 1269. The decisions of the district court are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1999. A petition for rehearing was denied on August 27, 1999 (Pet. App. 29). The petition for a writ of certiorari was filed on November 23, 1999. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Middle District of Florida, petitioner was convicted of knowingly distributing,

selling, and trafficking in unauthorized recordings of live musical performances, in violation of 18 U.S.C. 2319A. Petitioner was sentenced to 24 months' probation and a fine of $8,000. Petitioner appealed, and the court of appeals affirmed. Pet. App. 1-28.

1. This case involves the constitutionality of 18 U.S.C. 2319A, which makes the unauthorized recording of live musical performances, and the distribution, sale or rental of such unauthorized recordings, unlawful. Congress enacted Section 2319A, among other things, to bring United States law into conformity with various international agreements and treaties to which the United States is a party. Section 2319A is drawn from the Agreement on Trade Related Aspects of Intellectual Property (TRIPs), which was enacted as part of the Uruguay Round Agreements Act (URAA), and resulted from negotiations of the General Agreement on Tariffs and Trade (GATT). See Pub. L. No. 103-465, § 1101, 108 Stat. 4809, 4974; Pet. App. 5, 14-15.

In relevant part, Section 2319A provides:

> (a) OFFENSE—Whoever, without the consent of the performer or performers involved, knowingly and for purposes of commercial advantage or private financial gain—
>
> > (1) fixes the sound or sounds and images of a live musical performance in a copy or phonorecord, or reproduces copies or phonorecords of such a performance from an unauthorized fixation;
> >
> > (2) transmits or otherwise communicates to the public the sounds or sounds and images of a live musical performance; or

> (3) distributes or offers to distribute, sells or offers to sell, rents or offers to rent, or traffics in any copy or phonorecord fixed as described in paragraph (1), regardless of whether the fixations occurred in the United States;
>
> shall be imprisoned * * * or fined * * * or both * * *.

18 U.S.C. 2319A. Section 2319A thus prohibits the unauthorized recording, and the distribution of unauthorized recordings, of the sounds and images of live musical performances.

2. In 1997, a grand jury in the United States District Court for the Middle District of Florida returned an indictment charging petitioner with, among other things, trafficking in unauthorized recordings of the live musical performances of artists such as Tori Amos and the Beastie Boys, in violation of Section 2319A. Pet. App. 1-2; Pet. 3. Petitioner moved to dismiss the indictment on the ground that Section 2319A is unconstitutional, but the district court denied the motion without opinion. Pet. App. 2. While preserving his right to challenge the constitutionality of Section 2319A on appeal, petitioner pleaded guilty to knowingly distributing, selling and trafficking in unauthorized recordings of live musical performances in violation of Section 2319A. Pet. App. 1-2 & n.1.

3. Petitioner appealed, and the United States Court of Appeals for the Eleventh Circuit affirmed. Pet. App. 1-28.

Petitioner's primary argument on appeal was that Congress lacked constitutional power to enact Section 2319A under either the Copyright Clause, U.S. Const. Art. I, § 8, Cl. 8, or the Commerce Clause, U.S. Const. Art. 1, § 8, Cl. 3. The court of appeals first turned to

Congress's authority under the Copyright Clause, which affords Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. Art. I, § 8, Cl. 8. Petitioner contended that, under the Copyright Clause, Congress may extend copyright protection only to "[w]ritings," which must be "fixed" works—*i.e.*, works that have been recorded or otherwise memorialized in a physical or tangible medium. See Pet. App. 8-9. A live musical performance, petitioner argued, does not meet that "fixation" requirement. *Id.* at 9-10.

The court of appeals found it unnecessary to address petitioner's Copyright Clause argument, because it concluded that Congress had the power to enact Section 2319A under the Commerce Clause. Pet. App. 10. With respect to the Commerce Clause, the court held that because Section 2319A "clearly prohibits conduct that has a substantial effect on both commerce between the several states and commerce with foreign nations," it could be sustained as an exercise of Congress's commerce power under this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995). Pet. App. 14, 11-16.[1]

That did not end the court's analysis, however. In its view, "[t]he more difficult question in this case is whether Congress can use its Commerce Clause power to avoid the limitations that might prevent it from passing the same legislation under the Copyright Clause." Pet. App. 16. The court noted that "each of the powers of Congress is alternative to all of the other powers,

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[1] Petitioner does not challenge the court's holding that Section 2319A satisfies the requirements set forth in *Lopez*. Pet. 9-10.

and what cannot be done under one of them may very well be doable under another." *Ibid.* The court also acknowledged, however, that in "some circumstances * * * the Commerce Clause cannot be used by Congress to eradicate a limitation placed upon Congress in another grant of power." *Id.* at 23. Without deciding the question, the court of appeals assumed *arguendo* that Congress could not use the Commerce Clause to enact a statute that was "fundamentally inconsistent" with a limitation in the Copyright Clause. Pet. App. 23 n.12.

The court of appeals therefore examined whether Section 2319A is incompatible with the fixation requirement of the Copyright Clause and concluded that it is not. Pet. App. 25-26. In fact, the court noted, prohibiting unauthorized recordings (and the distribution of such recordings) of live musical performances "actually complements and is in harmony with the existing scheme that Congress has set up under the Copyright Clause." *Id.* at 24. Preventing the creation of and trafficking in such unauthorized recordings "promote[s] the progress of the useful arts by securing some exclusive rights to the creative author," the court explained, a result that is wholly consistent with the purpose of the Copyright Clause. *Ibid.* In addition, although the subject matter here (a live performance) might not have been "fixed" or reduced to a writing at the time the bootleg recording was originally made, the court observed, "it certainly was subject to having been thus fixed." *Ibid.*

The court noted that "there is another limitation in the Copyright Clause that may be implicated by the anti-bootlegging statute: the 'Limited Times' requirement that forbids Congress from conferring intellectual property rights of perpetual duration." Pet. App. 26.

Petitioner, however, had failed to challenge Section 2319A on that basis. *Id.* at 27. Accordingly, the court stated that it would not decide "whether extending copyright-like protection under the anti-bootlegging statute might be fundamentally inconsistent with the 'Limited Times' requirement of the Copyright Clause." *Ibid.*[2]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The decision below, moreover, is the first to address the constitutionality of 18 U.S.C. 2319A, and addresses only one narrow, limited issue related to that question. Further review therefore is not warranted.

1. Petitioner contends that the court of appeals erred by holding that Congress could enact Section 2319A under the Commerce Clause. Pet. 5-20.[3] Before

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[2] Petitioner also raised other contentions on appeal, but the court of appeals rejected them without discussion, Pet. App. 28 n.18, and petitioner does not seek review of those contentions in this Court.

[3] Petitioner asserts (Pet. 5) that "[a]ll parties concede that section 2319A creates copyright protections and that those protections cannot pass constitutional muster under the Copyright Clause." See also Pet. 8 ("In the Court of Appeals, the government agreed that section 2319A could not be sustained pursuant to Congress's authority under the Copyright Clause."). That is not correct. Although the government did not rely on Congress's powers under the Copyright Clause in the court of appeals, it never conceded that Section 2319A could not be sustained under those powers. See Gov't C.A. Br. 20 n.3, 23-24. Nor did the government concede that Section 2319A creates "copyright protections." Instead, the government has described the protections extended by Section 2319A as "sui generis intellectual property rights," which are distinguishable from copyrights. *Id.* at 14 & n.2;

this Court, petitioner does not dispute that the conduct regulated by Section 2319A bears a sufficient relationship to interstate and foreign commerce to fall within Congress's commerce powers. See Pet. 9-10. Instead, petitioner argues that, under the Copyright Clause, Congress can protect only "the [w]ritings" of authors. By permitting Congress to enact Section 2319A under the Commerce Clause to protect live performances that are not previously recorded or otherwise reduced to a "writing," he contends, the decision below "opens the door for Congress to legislate all copyright protections by way of the Commerce Clause and thus render the Copyright Clause, and potentially every other limited grant of authority contained in Article I, Section 8, superfluous." Pet. 6.

a. Petitioner misconstrues the scope and meaning of the court of appeals' decision. As an initial matter, the court of appeals assumed—without deciding—that the Copyright Clause may impose limits on Congress's commerce power. Pet. App. 23 & n.12. "[W]e take as a given that there are some circumstances," the court of appeals stated, "in which the Commerce Clause cannot be used by Congress to eradicate a limitation placed upon Congress in another grant of power." *Id.* at 23. For that reason, the court "assume[d] arguendo, without deciding, that the Commerce Clause could not be used to avoid a limitation in the Copyright Clause if the particular use of the Commerce Clause (*e.g.*, [Section 2319A]) were fundamentally inconsistent with the particular limitation in the Copyright Clause (*e.g.*, the fixation requirement)." *Id.* at 23 n.12. In this case, petitioner identifies only one limit on Congress's power

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see Pet. App. 7 (describing rights at issue as "quasi-copyright" or "sui generis" protections).

under the Copyright Clause with which Section 2319A is allegedly inconsistent, namely the "writing" or "fixation" requirement. After thorough analysis of the Copyright Clause and Section 2319A, however, the court of appeals concluded that Section 2319A is not fundamentally inconsistent with that requirement. See p. 5, *supra*.

Petitioner thus is incorrect to characterize the court of appeals' decision as holding that the Copyright Clause imposes *no* limits on Congress's commerce power. Pet. 6, 19-20. The actual decision was exceedingly narrow. See Pet. App. 23 ("in reaching our conclusion in this case, we undertake a circumscribed analysis, deciding only what is necessary to decide this case, and we reach a narrow conclusion"). The court of appeals merely concluded that, under the circumstances of the present case, Congress's decision to extend protection against unauthorized or bootleg recording and distribution of live musical performances was not "fundamentally inconsistent" with the "writing" requirement of the Copyright Clause, which limits its protections to matters that are fixed or recorded in a tangible medium of expression. *Id.* at 24-28.

2. The narrowness of the court of appeals' decision and the absence of other appellate authority on point also counsel against review by this Court. For example, the court of appeals here did not address myriad other issues, many of which might have to be decided in petitioner's favor before Section 2319A could be held unconstitutional. First, the court of appeals did not answer whether Section 2319A could be sustained under the Copyright Clause, because that issue was not necessary to its decision. See Pet. App. 10 ("Because we affirm the conviction in the instant case on the basis of an alternative source of Congressional power, we

decline to decide in this case whether the fixation concept of Copyright Clause can" be extended to cover live musical performances capable of fixation.). Second, the court of appeals did not decide the extent to which the Copyright Clause in fact imposes limits on Congress's power to enact legislation under the Commerce Clause; instead, the court merely assumed, *arguendo*, that the Copyright Clause does impose particular limits. See Pet. App. 23 & n.12. Third, the court of appeals did not address whether Section 2319A's prohibition on the unauthorized recording of live musical performances (and the distribution of such recordings) is consistent with the Copyright Clause's "limited Times" requirement, because petitioner failed to raise that issue in a timely fashion. Pet. App. 26-27, 28 n.17. Indeed, petitioner failed to show that, as applied in this case, the Act afforded protection that exceeded the temporal limitations that are provided by statute for the protection of copyrights, *i.e.*, the life of the author plus 70 years, see 17 U.S.C. 302(a) (Supp. IV 1998).

The decision of the court of appeals not only is exceedingly narrow, but also is the first to have addressed Congress's power to enact Section 2319A. Thus, no other court of appeals has addressed the one issue the court below actually decided (that Section 2319A is not fundamentally inconsistent with the Copyright Clause's "writing" requirement). And no court of appeals has addressed any of the related legal questions described above. See pp. 8-9, *supra*. Under these circumstances, there is no compelling reason for the Court to consider the matter immediately and without the benefit of the reasoning or views of other courts of appeals.

3. Petitioner's claim that Section 2319A lies outside Congress's Commerce Clause powers rests primarily on this Court's decisions in *Bonito Boats, Inc.* v. *Thunder*

Craft Boats, Inc., 489 U.S. 141 (1989), and *Feist Publications, Inc.* v. *Rural Telephone Serv. Co.*, 499 U.S. 340 (1991). See Pet. 16-18. Neither decision supports petitioner's contention that the Copyright Clause renders Section 2319A *ultra vires*.

a. In *Bonito Boats*, this Court concluded that the Florida intellectual property law at issue there conflicted with the federal patent *statute*. Through federal patent law, the Court explained, Congress had established a "balance" between the goal of promoting innovation and the desire to promote the use of innovations to maximum public advantage. See 489 U.S. at 151-152. The Florida law, the court noted, sought to protect a product design after, for purposes of federal patent law, it had passed into the public domain. See *id.* at 159. Because the Florida law sought to withdraw otherwise unpatentable innovations from public use, the Court explained, it impermissibly undermined the balance Congress had established. *Id.* at 157. The Court did not hold that *Congress* itself lacks the power to alter the balance the Constitution permits it to establish.

In discussing the Copyright Clause in *Bonito Boats*, the Court did state that it "contains both a grant of power and certain limitations upon the exercise of that power." 489 U.S. at 146. That statement, however, refers to Congress's power under the Copyright Clause alone; it does not purport to address Congress's power under the Commerce Clause, which was not at issue in *Bonito Boats*. Besides, in this case, the court of appeals assumed for the sake of argument that limits in the Copyright Clause, such as the "writing" or "fixation" requirement, do limit Congress's powers under the Commerce Clause. Pet. App. 10, 23 & n.12. It found, however, that there was no fundamental conflict between those limits and Section 2319A.

b. Petitioner's reliance on this Court's decision in *Feist* is similarly misplaced. In *Feist*, the Court addressed whether telephone directory white pages are entitled to copyright protection under the Constitution or the Copyright Act. 499 U.S. at 363-364. It held that, because the white pages directory did not qualify as an "original" work, it was not eligible for copyright protection under the Copyright Clause of the Constitution or the Copyright Act. Nowhere did the Court specifically address any possible or further limitations on the scope of Congress's power under the Commerce Clause.

Recognizing as much, petitioner relies (Pet. 16) not on *Feist*'s holding, but on its assertion that the "primary objective of copyright is not to reward the labor of authors, but [t]o promote the Progress of Science and useful Arts." See 499 U.S. at 349 (internal quotation marks omitted). The Court made that statement, however, in discussing the basis for the originality requirement: "To this end, copyright assures authors the right to their *original* expression, but encourages others to build freely upon the ideas and information conveyed by a work." *Id.* at 349-350 (emphasis added). In this case, the court of appeals expressly concluded that a "live musical performance clearly satisfies the originality requirement." Pet. App. 24. Petitioner, moreover, does not raise the originality requirement in his petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

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